#180A

THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1980, c. 340, as amended

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IN THE MATTER OF:

The Complaints of Mrs. Edilma Olarte, 1235 Bathurst Street, Mrs. Eneyda Mejia, 539 Dundas Street West, Mrs. Edilma Biljak, 190 Jamieson Avenue, Apt. 202, Mrs. Maria Magnolia Estrada, 650 Parliament Street, Apt. 605, Ms. Elvira Benel, 528A College Street, and Mrs. Yolanda Munoz, 94 Cowan Avenue, Apt. 202, all of Toronto, Ontario, that Commodore Business Machines Ltd., its servants and agents, and Mr. Rafael DeFilippis, Supervisor at Commodore Business Machines Ltd., at 946 Warden Avenue, Toronto, Ontario, discriminated against each of them on the basis of sex, in contravention of paragraphs 4(1)(b) and/or (g) of the ONTARIO HUMAN RIGHTS CODE, R.S.O. 1980, c. 340, as amended and also IN THE MATTER of the Complaints of the said Ms. Elvira Benel and said Ms. Yolanda Munoz that the said Commodore Business Machines Ltd., its servants and agents, and the said Mr. Rafael DeFilippis discriminated against them in contravention of paragraphs 6(a) and/or (e) of the said CODE.

APPEARANCES:

Ms. Michele Smith and Ms. Bella Fox, Counsel for the Ontario Human Rights Commission.

Ms. Paula M. Rusak and Ms. D. Jane Forbes - Roberts, Counsel for the Respondents.

A HEARING BEFORE:

Peter A. Cumming, a Board of Inquiry in the above matters appointed by the Minister of Labour, the Honourable Russell H. Ramsay.

## DECISION AND ORDER

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## 1. INTRODUCTION.

This hearing involved six female Complainants, all of whom alleged discrimination on the basis of sex in contravention of paragraphs 4(1)(b) and (g) of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended, now R.S.O. 1980, c. 340, as amended (hereafter the "Code") against the corporate Respondent, Commodore Business Machines Ltd., (hereafter "Commodore"), a manufacturer of business machines, and one of its employees, Mr. Rafael De Filippis. Mr. DeFilippis was the foreman on the afternoon shift at Commodore's Warden Avenue, Toronto, plant from 1973 until March 1981, when he was transferred to Commodore's plant on Pharmacy Avenue in Toronto. The six Complainants were factory workers with the corporate Respondent at its Warden Avenue plant at the times that they alleged sexual harassment on the part of the individual Respondent with the alleged knowledge and acquiescence of the corporate Respondent.

The individual Respondent, Rafael DeFilippis, denied that he sexually harassed any female employee and the corporate Respondent denied any sexual harassment by Mr. DeFilippis, and implicitly as well, any knowledge of harassment if such existed.

Two of the Complainants, Ms. Elvira Benel and Mrs. Yolanda Munoz, also alleged that the Respondents breached paragraphs 6(a) and (e) of the Code, on the basis that they had their employment terminated because they might make complaints under the Code.

The hearing lasted some thirty-six days, including nine days of argument, with some 56 witnesses, and 117 exhibits, and thirty-seven volumes of evidence and argument. Given the extraordinary nature of the accusations by the Complainants, and the complete denial by the Respondents, the credibility of all the parties and principal witnesses was very much in issue. In essence, the Respondents alleged that the six Complainants were lying and had formed a conspiracy against the Respondents for two reasons: first, with the hope of pecuniary gain through this proceeding and second, with the objective of getting back at the individual Respondent because, as a forman, he had been too strict a disciplinarian, too demanding in terms of production, and too mean in terms of criticism towards the workers on his shift.

The gulf between the asserted positions of the Complainants and Respondents continued to the conclusion of the Board of Inquiry, as evidenced by the submissions in argument of counsel which included, by counsel for the Ontario Human

Rights Commission, a submission that punitive damages of $60,000.00 be awarded (in addition to general and special compensatory damages of some $60,000.00), and on the other hand, by counsel for the Respondents, a submission that the Complaints be dismissed as simply "frivolous" and, as such, with an award of costs in favour of the Respondents.

Both sides to this case evidenced strong feelings and emotions ran at a high pitch throughout the hearing. Underlying the issues in this case are significant social issues of concern to Canadian society.

First, protection by the law from "sexual harassment" has been extended only in the last few years - the first reported Canadian case being on September 20, 1980. The phenomenon of 'women's rights' (being quite probably the most profound social change of our generation to Canadian society) as one aspect has resulted in a much-heightened consciousness of 'sexual harassment' in the workplace. Society's general perception of such activity, has shifted from seeing it as simply morally, ethically and socially unacceptable and repugnant behaviour, to seeing such activity as also being unlawful, prohibited by the comprehensive coverage of the Code, specifically, paragraphs 4(1)(b) and (g) , which read:

> 4. (1) No person shall,
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> .... or
>
> (g) discriminate against any employee with regard to any term or condition of employment,
>
> because of...sex...of such...employee.

It can be said, if I may generalize from my limited experience stemming from the cases that have come before me, that 'sexual harassment' is a much more insidious and pervasive problem in the workplace than most people realize.

However, while recognizing that sexual harassment of employees in the workplace is, and should be, unlawful, some people also resent this extension from the realm of being simply 'socially unacceptable' to being conduct prohibited by law. This resentment surfaces, I think, for four reasons. These reasons were undertones to the evidence of some witnesses, and comments by counsel, in this Inquiry.

The first reason is that there is concern by some about the law intruding into social relationships stemming from the workplace environment. Professor Berns, in considering the "Interim Guidelines on Sexual Harassment" published in the Federal Register by the United States' Equal Employment Opportunities Commission, put such concerns as follows:

> ...(A)dherence to the guidelines may impose some economic costs on industry, but these costs will probably be insignificant and, anyway, unlike the costs of putting "scrubbers" on the nation's coal-burning furnances, are probably incalculable. If enforced in the same zealous spirit that has sometimes characterized the commission's work in the area of racial discrimination, however, the guidelines will certainly have an impact on the commercial environment and on the men and women who work in it — I mean, an impact other than, or in addition to, the one nominally sought by the commission. Their enforcement will take the national government into an area where it does not belong and require it to do things that ought not be done by a government founded on liberal principles.
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> In our time, the government may fix prices, limit emissions, forbid effluents, bus children, set quotas, prescribe diets, and proscribe medicines, and some sort of case can be made for each of these regulatory policies. (Rather the COWPS, EPA, OSHA, FDA, EEOC, FTC, and the rest than - to take the extreme cases - runaway inflation, unbreathable air, undrinkable water, explosive grain elevators, poisoned mothers and deformed babies, or morally corrupting television programs). But now this national government is threatening the essentially and necessarily private realm of the erotic.
>
> Of course, this will be denied by the commission. It will protest that its concern in the workplace, not the bedroom; but many lovers who end up in the bedroom meet in the workplace. That its purpose is the prevention of sexual harassment, not the inhibiting of romance; but in its efforts to identify the one, the commission will intrude upon the other. That it will not interfere with the easy and sometimes playful familiarity that characterizes the relations of men and women. That its simple goal is a workplace where men look upon women as equals and not as sex objects; but even the man at work is aware that women are different and that the difference is to destroy the relationship. That it will provide no congenial forum for the malicious and fase accusation; but men will accept that assurance only at their peril. That it will never use its power vindictively against firms or organizations that have the courage or temerity to oppose it; but there are organizations - a couple of little private and wholly privately funded colleges come to mind - that can demonstrate the worthlessness of such assurances. That it is aware that women can provoke men, and that the final guidelines will take this

> into account; but it will not admit that Rousseau was right when he said that women give the law in love because, "according to the order of nature, resistance belongs to them."
>
> In the sexual harassment literature there is no such thing as romance; there are only commercial or power relationships - marriage, prostitution, or harassment - in which women are required to exhange "sexual services for material survival." And there is no such thing as nature. That, the feminists say, is the trouble with the law: it reinforces the pernicious and unscientific view that there is an essential difference between men and women and it is this view that is responsible for sexual harassment. It encourages men to define women on the basis of their sexuality, while, according to nature, the differences between men and women are insignificant. One's sexual identity is determined by social factors - as MacKinnon puts it, the most salient determinents of sexuality "are organized in society, not fixed in 'nature'" - and these social factors must be eliminated by changing the laws.
>
> ...
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> But by respecting the privacy of the erotic relationship, the law gives men and women together the right to be let alone, and does this not in order to allow men to beat their wives or harass their secretaries with impunity - although these may be some of the consequences - but to allow them to desire each other, enjoy each other, give pleasure to each other, and consumate the love they bear for each other. Thus, traditionally, love has been seen to be none of the government's business. (Harper's, October, 1980, p. 20)

Second, as suggested in the above quotation, it is often difficult to draw the line in factual situations between permissable social contact (if sometimes morally offensive) and conduct that is unlawful. Sexual harassment cases, unlike for example, murder or rape questions, are more diffuse in their factual circumstances with the line of permissable/impermissable conduct blurred when measured against society's norms.

Third, and more important, just as our society is expanding the human rights and freedoms of its citizens, and in particular, expanding the rights of women, as our society presses forward in trying to achieve true and meaningful equality of opportuntity for all, it is realized that such extension of rights necessitates some greater regulation of the workplace. In the present case, the corporate Respondent is a very valued, efficient manufacturer of goods (including computers) and a significant contributor to the economic well-being, and hence social well-being, of our society. It provides jobs, and produces products at a reasonable cost that are much in demand. There is an undertone of resentment, by its management, clear from the evidence, that

the government through the Ontario Human Rights Commission should intrude with further regulations and its accompanying cost, in its business operations. In short, while there is widespread recognition of the merits of extending the law to prohibit sexual harassment, there is at the same time often a resentment by employers of the added inconvenience and cost through increased regulation of the workplace. They fail to see the forest for some of the trees.

Fundamental to the concept of discrimination is the existence of a preference or distinction based on an individual's characteristics, but not related to an individual's merit. Section 4 of the Code lists specific characteristics in respect of which discrimination is prohibited. Therefore, the Ontario Human Rights Code enunciates as public policy the protection of certain classes of individuals who historically have been particularly vulnerable to adverse discrimination.

The Preamble to the Code sets forth clearly the principles underlying the Code:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;

The essence of this legislation is to advance equality of opportunity within the framework of the most basic values of Canadian society. These values are intrinsic and fundamental to the fabric of our society, and to western civilization generally.

> Every statement about the nature of racial discrimination is based, more or less explicitly, upon an idea of the equality of human beings, which has advanced to its present form only relatively recently. The origins of this idea of human equality may be traced to the traditional Judaeo-Christian belief in the Fatherhood of God and hence in the brotherhood of men, each with equal humanity and significance.
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> ...
>
> This perception of the fundamental equality of men, despite the manifold differences between individuals,

> lies at the heart of liberal and democractic thought in the West.
>
> (A. Lester and G. Bindman, Race and Law, pp. 73-4, Penguin, Eng. 1972).

There is a cost to Ontario in ensuring that its stated philosophy is more than simply words. But one only has to travel briefly back into history, or take a journey of a few hours to other countries in our contemporary world, to realize how important and precious, but fragile, these values are. The institutions of western civilization are rooted in thousands of years of difficult history. The human condition has not been an easy one. There is a continuing pursuit of true freedom of equality. For example, it was only eleven years ago that discrimination on the basis of sex was made unlawful by the Code, and only three years ago that this provision, in turn, was interpreted to mean that sexual harassment is prohibited. The recent constitutional enactment of the new Canadian Charter of Rights and Freedoms is, of course, the most dramatic illustration of this continuing evolution.

The point is - a society such as Ontario that espouses these values, with their accompanying benefits to its residents, must bear the relatively insignificant costs of ensuring that its stated philosophy is more than simply words. Employment practices within the private sector must be flexible and meet the standards demanded by these values as enshrined in the Code. No person, employer or employee, can claim through the exercise of his right of freedom to encroach upon the fundamental rights of freedom of other persons. These rights now include the right in law to protection from sexual harassment in the workplace. Human rights legislation seeks to ensure employment on the basis of merit. It is entirely consistent with the imperatives of the modern Canadian economy that people be hired on the basis of merit. Therefore, equality of employment opportunity must be seen as both a social and an economic necessity. (See Life Together: A Report on Human Rights in Ontario: Ontario Human Rights Commission, 1977).

It is emphasized that the Code does not compel employers to treat all applicants or employees identically. The Code is directed simply towards ensuring fundamental equality in employment (that is, freedom from discrimination on prohibited grounds) consistent with other goals of the employer and society, such as eliminating incompetence, ensuring safety, and achieving efficient productivity. The goal of the Code is to ensure employment on the basis of merit, and this objective is consistent with, and complementary to, the legitimate aspirations of employers. There is not unlawful

discrimination where the employer establishes that "sex" is a bona fide occupational qualification and requirement for employment. The employer has the right to hire the best qualified person.

A fourth reason for resentment about the Ontario Human Rights Commission investigating complaints of sexual harassment is the feeling that a public, government agency is being used to present private claims for money by aggrieved female workers. A monetary award is necessarily the principal component of "compensation" for any injury. There is nothing unusal about this. What is somewhat unique is that human rights legislation, in effect, creates a tort (a civil wrong) by statute and when a person suffers an injury to their rights protected by such legislation, a government agency investigates the complaint on behalf of the aggrieved person, leading to a board of inquiry in some cases, where the government agency conducts the litigating of the complaint. This approach is, of course, true of all human rights violations, not just sexual harassment cases. However, in contrast, with most torts, or civil wrongs, the aggrieved person must pursue a civil action through the courts on his or her own initiative and cost (although legal aid will assist in some circumstances). For example, a person injured in a car accident must enforce his rights through his own initiative, by suing the tortfeasor if necessary.

However, there are very significant differences in the two situations. With human rights violations, it is very often true that the aggrieved person would not have the resources or means to pursue a claim privately even if that were legally possible. It is usually the little people in society who have their human rights compromised. More importantly, with human rights violations, all of society has a most compelling interest in protecting the rights of the complainant, for the protection of such individual's fundamental rights and freedoms is critical to the maintenance and enhancement of those same rights and freedoms enjoyed by all other citizens. If we are not zealous in collectively protecting any particular aggrieved person's basic rights, we are not only not truly civilized, but we run a significant risk in the more general compromise, diminution or abandonment of the basic rights and freedoms of all citizens.

A second underlying aspect to this hearing was the fact of the many immigrant people to Canada, of differing racial origin, varied cultural backgrounds, and different languages, who work for the corporate Respondent in its factories. Most witnesses used an interpreter although almost all could speak some English. It was suggested that the different cultural perspectives accounted for some misunderstandings in the context of the issues in this case. Witnesses included workers who had immigrated

to Canada from Colombia, Guatemala, Ecuador, Peru, the Philippines, Portugal, Italy, Greece, Cyprus, Israel, Yugoslavia, India, as well as English-speaking countries of the Carribean. The truly multi-cultural nature of the present Toronto community can be seen in the corporate Respondent's labour force. Many of these people were largely unskilled labourers at the minimum wage, non-unionized in one of the two factories which were the subject of the hearing. Thus, this Hearing raised issues of womens' and workers' rights, in the contemporary, multicultural, bluecollar workplace in Toronto.

These aspects perhaps accounted for the strong feelings and emotions expressed by witnesses, and sometimes counsel, during the Hearing. With this introductory background, the two questions before this Board of Inquiry shall now be addressed. Was there sexual harassment of the six Complainants such as to constitute breaches of the Code by the individual Respondent? If there was, then is the corporate Respondent also liable under the Code?

## 2. INTERIM DECISIONS.

(1) Motion re "Similar Fact Evidence."

The Board of Inquiry had heard some six days of evidence in February, 1983, when the hearing was adjourned until July 4, 1983. In the February hearing, a motion was made by counsel for the Ontario Human Rights Commission to introduce what is referred to as "similar fact evidence" when the hearing resumed in July. Perhaps such a motion is one properly made by the Respondents objecting to similar fact evidence when it is proposed to be introduced in evidence. However, it was to the convenience of all parties to have a determination by myself of the matter well in advance of the resumption of the hearing July 4, so that counsel could prepare accordingly in the interim.

In making the motion, counsel for the Commision emphasized that the Commission is seeking both compensatory and punitive damages in respect of the Complaints. The Commission has sought to establish knowledge and acquiesence by the corporate Respondent of the alleged harassment by its employee, the individual Respondent. The Commission seeks to establish corporate responsibility.

The Respondents in their defence allege, inter alia, that there was a conspiracy by the Complainants against the Respondents. Credibility was very much in issue.

The Commission is of the view that such similar fact evidence is relevant to the establishing of corporate responsibility and establishing that there was not any conspiracy on the part of the Complainants, and to the question of punitive damages, if one or more of the Complainants are successful on the merits.

I allowed the Commission to introduce similar fact evidence in respect of eight persons, and did not allow the introduction of the evidence by three other persons. My full written reasons for that interim decision were given March 31, 1983: (1983) 4 C.H.R.R. D/1399. A brief summary of my reasons is useful at this point.

Exercising my discretion in respect of the motion, in my view the suggested evidence of eight persons was relevant, that is, had a probative value for the issues in this hearing. The Ontario Human Rights Code prohibits discrimination because of sex (sexual harassment) in the workplace to extend to all employees equality of opportunity in employment, through assuring employment on the basis of merit rather than

irrelevant, arbitrary criteria that offend the normative values of society as expressed in paragraphs 4(1) (b) and (g) of the Code.

The six Complaints all contain the same basic allegations - sexual harassment by the individual Respondent, and that such harassment was known and acquiesced in by the corporate Respondent.

In my opinion, the probative value of allowing the evidence of the referred to eight persons far outweighed any possible prejudicial (in the sense of unfairness) impact.

All six Complainants, and the above mentioned eight persons, allege a pattern or system of conduct toward female employees on the part of the same individual, within the same factory, of the same employer. The difference in time frames of employment by some witnesses is, to my mind, an irrelevant factor for the most part. What is certainly relevant is evidence which goes to the main issue of the employment relationship between female employees, their supervisor the individual Respondent, and whether there was unlawful conduct on his part, and if this is established, then was it known and acquiescenced in by the corporate Respondent. The evidence of all these eight persons would relate to the same matter - the relationship of the Respondents to female employees. The evidence of each of the persons referred to, and each of the Complainants, if believed, would tend to corroborate the Complaints. (However, the opposite holds true as well. If any one or more witnesses' testimony is not accepted, it would tend to throw doubt upon the testimony of the others, and would tend to support the Respondent's contention that there was no discrimination, and that there is a conspiracy on the part of the Complainants). I did not see any unfairness in the admission of evidence by these eight persons. For the same reasons, the evidence of each one of the Complainants is relevant and admissible to a determination of the other five Complainant's cases. The similar fact evidence easily met the test for admissability set forth by the Supreme Court of Canada in a recent case, Sweitzer v. The Queen (1982), 68 C.C.C. (2d) 193, per McIntyre, J. at 196.

For the same reasons as well, in my opinion the evidence of the three other persons who I did not allow to testify, if given and believed, would not have been relevant to a determination of the issues in respect of the six Complaints. Admittedly, there may have been some, very slight, probative value to such evidence, but I think the appearance of prejudice would far outweigh such slight, tenuous, probative value. I say "appearance of prejudice" because I would give very little weight, perhaps none, to the impact of such evidence of these three persons upon the central issues of this hearing, in any event.

Their evidence would have related to accusations against another supervisor, albeit in the same workplace of the same employer. The conduct of another person toward female employees has a very tenuous connection at most to the issue of the conduct of the individual Respondent. As well, because the alleged incidents of the three persons related to a time frame in each instance, that was subsequent to the time frames referred to in the six Complaints, this evidence would not be helpful in determining knowledge on the part of the corporate Respondents for the earlier Complaint - related time frames. For these reasons, I held that these three persons should not be allowed to give evidence.

(2) Motion to Quash Subpoena Duces Tecum.

A second motion was made during the Hearing, (Transcript, Vol. IX, p. 7), being a motion to quash a subpoena duces tecum , (see also Exhibit # 32) served upon Ms. Christine Wood, the payroll/personnel manager for Commodore. By this subpoena, Commission counsel sought to have the personnel files produced for the six Complainants, and the female employee witnesses on behalf of the Complainants, who also alleged sexual harassment.

In my view, as set forth in section 12 of the Statutory Powers Procedure Act, 1971, S.O., c.47, any evidence, including documentary evidence, that is relevant, is admissable, unless there are exceptional circumstances recognized by the law, for example, privilege. At the time of arguing about the issue of 'similar fact' evidence, on March 12, one of several arguments made by Respondents' counsel (Transcript, Vol. VII, pp. 49, 50) was that to allow female employees to testify as witnesses in this proceeding, when they might be complainants themselves in a later proceeding, was somehow an abuse of process, an "oppression of the Respondents" and would put the Respondents in "double jeopardy". I was asked to exercise discretion under the powers confered upon me by section 23 of the Statutory Powers Procedure Act to disallow the introduction of the 'similar fact' evidence. My written reasons for allowing the similar fact evidence to be introduced in evidence were given March 31, 1983, and are summarized supra. However, Respondents' counsel again asserted the same point (Transcript, Vol. IX, pp. 12, 13,16) at the Hearing July 5, now in the context of the subpoena served upon Ms. Wood, alleging that the Commission was on a "fishing expedition" seeking to assist itself in the investigation of complaints made, or to be made, by female employee witnesses other than the six Complainants. Respondents' counsel argued further that Commission counsel

could not possibly determine relevancy until the documents were actually produced, but on the other hand, was not entitled to production until she could prove relevancy.

The Code provides in paragraph 16(2)(b) certain powers whereby the "Commission or an officer of the Commission may ... require the production for inspection and examination of employment applications, payrolls, records, documents, writings and papers that are or may be relevant to the investigation of the complaint". Subsection 16(5) of the Code provides further that:

> "No person shall hinder, obstruct, molest or interfere with the Commission or an officer of the Commission in the exercise of a power or the performance of a duty under this Act or withhold from it or him any employment application, payrolls, records, documents, writings or papers that are or may be relevant to the investigation of a complaint."

However, it would appear that this means of obtaining production for discovery does not survive the inquiry stage, that is, that point in time when the Commission concludes a settlement cannot be achieved, and recommends to the Minister whether or not a board of inquiry should be appointed, as referred to in subsection 17 (1) of the Code. As the Code contemplates two distinct stages to the Complaint process, an inquiry and conciliation stage (s. 16(1)) and a Board of Inquiry stage (s. 17), and the right of discovery as comtemplated by paragraph 16(2)(b) refers only to the "inquiry" stage, the legislature seems to have limited production for discovery purposes in respect of human rights complaints to only the inquiry stage as set forth in the Code.

Paragraph 12(1)(b) of the Statutory Powers and Proceudres Act seems to only allow a subpoena duces tecum to require a person "to produce in evidence" the documents specified in the subpoena. See the Board of Inquiry decision in Guru v. McMaster University, (Professor M. R. Gorsky; Ontario, November 12, 1980, at pp. 4,5).

As an aside, I mention that the absence of discovery, followed by the service of a subpoena deces tecum, may have the unintended but unavoidable consequence of allowing an adjournment at the hearing, as allowed by section 21, given the production of documents in evidence that come as a surprise to the party causing the subpoena to be given.

In Guru, Professor Gorsky quashed a subpoena duces tecum, for the reason that, as conceded by counsel for the Commission who had requested the subpoena, it was being used simply for discovery purposes (pp. 1,3). Professor Gorsky noted there was no common law right of discovery (p. 1).

Professor Sidney N. Lederman, sitting as a Board of Inquiry, has given a decision to the same effect. He equated the subpoena comptemplated by paragraph 12(1)(b) of the Statutory Powers Procedures Act with a subpoena duces tecum, and I think this a valid comparison. (See Nembhard and Manradge v. Caneurop Manufacturing Limited, Ontario: March 11, 1976, at pp. 22, 23).

Subsection 12(1) of the Statutory Powers Procedure Act reads:

> "(1) A tribunal may require any person, including a party by summons,
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> (a) to give evidence on oath or affirmation at a hearing; and
>
> (b) to produce in evidence at a hearing documents and things specified by the tribunal,"

I agree with the decisions in Guru and Caneurop that under paragraph 12(1)(b) of the Statutory Powers Procedures Act, production of a document is to be for the purpose of producing it in evidence at the hearing and not simply for the purpose of obtaining discovery. However, the subpoena upon Ms. Christine Wood meets the standard of paragraph 12(1)(b) as it was for the purpose of producing documents as evidence, and not for discovery purposes. Hence, the subpoena is valid, being authorized by paragraph 12(1)(b) of the Statutory Powers Procedures Act.

I have noted as well, as cited in the decision of Professor Gorsky in the Guru decision (p. 4), that I may have the discretion to set aside the subpoena as a

> subpoena duces tecum or an application in the nature of such a subpoena ... may be set aside or refused where it appears that the request is irrelevant, fishing, speculative or oppressive."

The Supreme Court Practice, 1979, Part I, states at p. 606 referring to Senior v. Holdsworth, ex p. Independent Television News Ltd., (1976) Q.B. 23 at p. 35, per Lord Denning:

> "... the court should exercise this power only where it is likely that the (document) will have a direct and important place in the determination of the issues before the court. The mere assertion that the (document) may have some bearing will not be enough. If the judge considers that the request is ... fishing or speculative ... the judge should refuse it.
> (emphasis added).

However, I did not think that I should exercise my discretion to set aside the subpoena served upon Ms. Wood, as I did not think the subpoena to be "irrelevant, fishing, speculative or oppressive."

I have also benefited from the decision of Bayda, J. in Re: Dalgleish and Basu 51 D.L.R. (3rd) (Sask. H. Ct.). He set forth the four factors to consider in determining whether the contents of a subpoena duces tecum are sufficiently specific to be considered fair and feasible and reasonably distinctive in all the circumstances of the situation (at pp. 312, 313). The learned Justice stated:

> Second: it is proper to ask: has the party issuing the subpoena had an opportunity to familiarize himself with the documents of which he now seeks production? If, for example, the circumstances are such that it is reasonable for the party to first make a request to have the witness disclose the documents and the witness refuses and the relevant procedure makes no provision for a prior compulsory discovery of the documents in the control of that witness then a description of the documents less detailed than if the situation were otherwise, will be tolerated. (at p. 312)

That factor is important to keep in mind in human rights hearings.

Finally, my decision in the instant situation in respect of the Wood subpoena is consistent with my decision in Ahluwalia v. Metropolitan Toronto Board of Police Commissioners, which decision was upheld by the Divisional Court, (1980), 27 O.R. (2nd), 48 (Div. Ct.).

Labrosse, J. stated, at p. 49:

> "The second application is for an order quashing the ruling of the board of inquiry whereby the respondent Dickson was required to produce the personnel records of certain members of the Metropolitan Toronto Police Force and whereby counsel for the board was granted an adjournment and the right of access to and of examination of such records before the inquiry proceeded."

He stated further at p. 53:

> "We find no error in the ruling of the board of inquiry in refusing to set aside the subpoena for the production of

> records. There is no material in the record to enable this Court to make any determination respecting the relevance of the documents. The board has already decided that the examination of the records will be held in camera in order to protect the identity of the constables involved. In so far as their admissibility, it will be for the board to determine at the time counsel seeks to introduce them into evidence, and if they are admissible, to determine the weight they should be given.
>
> Mr. Parker submitted that the board has ruled in advance that the records are admissible as evidence. If this is so, and the transcript is not clear on this point, then the board was in error, because in our view, the appropriate time to rule on their admissibility is as stated above.
>
> Finally, in respect of the adjournment granted to counsel for the board, to permit him to examine the records, this was purely a matter of discretion. The board has exclusive jurisdiction over the conduct of its procedure and the exercise of its discretion to grant the adjournment is not reviewable by this Court, provided that the board has not violated recognized principles of fairness or conducted itself in such a way as to amount to a refusal of jurisdiction, which is not the case here. In any event, the transcript indicates that the adjournment was granted for two reasons: to permit counsel for the Board to examine the records and to permit counsel for the applicants to bring these applications."

Commission Counsel in that case was not seeking to utilize the subpoena duces tecum as a discovery device. That is, subject to the test of relevancy, personnel records were admissable, and an adjournment at any point of time within the discretion of the Board of Inquiry could be given for the purpose of allowing Commission counsel to examine such records introduced, or to be introduced, in evidence.

I think it useful, as an aside, to mention briefly that the person who is subject to a subpoena duces tecum need not be a witness beyond the mere production of the documents specified in the subpoena.

> "... (T)he summoning party is entitled to require the witness to produce the document, without putting him on the witness stand to speak as to his general knowledge of the case ... the document, unless it is one which "proves itself" on production, will have to be proved by some other witness". (2 Holmested and Gale, The Judicature Act, 1508).
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> Wigmore, On Evidence, at p. 126 is to the same effect.
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> "The ordinary clause "ad testificandum" is, however, at the same time commonly preserved, and the question is thus raised whether the summoning party can require the production of a document without also putting the producer on the stand to

> speak as to his general knowledge of the case. It would seem that the two forms of testimony are separable and that the summoning party may therefore elect to have the one without the other. This is the generally accepted opinion. This result harmonizes with the solution of the analogous question ( 1894 supra) whether the calling of the witness merely to produce a document makes him the party's own so as to subject him to cross-examination by the opponent."

Under section 12 of the Statutory Powers and Procedures Act any person can be required to produce in evidence at a hearing documents relevant to the subject matter. It seemed to me that documents pertaining to the Complainants, or female employee witnesses on their behalf, relating to their employment with Commodore prima facie might well be relevant to the issues in this inquiry. For example, hypothetically, suppose a memo made by management was in a Complainant's personnel file that related to observations in the workplace of sexual harassment of her. It seemed to me that any documents relevant to the issues in the proceeding tending to support, or detract from, the Complaints of the Complainants, or the credibility of female employee witnesses, should be introduced in evidence (Transcript, Vol. IX, p. 17). Therefore, on this reasoning the personnel files as such were prima facie relevant, but it could not be determined that any particular document therein was relevant until read and considered. The personnel files all pertained to the employment relationship, and a central issue of this hearing is who is telling the truth about the nature of that employment relationship. The records of the employer might shed some light on the allegations of sexual harassment. In my view it was in the interest of all the parties that any documents that might help to answer questions very much in dispute, about the employment relationship, be produced. Clearly, there is an element of discovery to such a subpoena (Transcript, Vol. IX, pp. 20, 21) and there is authority that a subpoena duces tecum cannot be used for mere discovery purposes, but the subpoena was not being used in this instance for mere discovery purpsoses. The documents were implicitly identified as being the personnel records, as those were the only records in Ms. Wood's custody (she being the payroll/personnel manager to Commodore) and as I have said, the personnel records, germane to the employment relationships, were prima facie relevant to the issues in the Inquiry.

I dismissed the motion that the subpoena duces tecum be quashed, Ms. Wood took the stand and produced the files which were marked for identification purposes (Exhibits # 33, #34, #35, #36, #37, and #38) and Ms. Wood was then stood down from the witness stand to allow Commission counsel to review the files and determine

whether she wanted to seek to introduce any documents. At this point of time any specific document sought to be introduced would, of course, have to meet the test of relevancy.

Very few, if any, documents from these files were introduced in evidence, and these did not assist in determining the central issues before me.

There was considerable conflict between counsel in this case, not only in respect of documentary evidence, but throughout the entire Inquiry. Counsel on each side believed fervently in the innocence of their clients and the merits of their clients' position. Counsel on both sides assumed extreme adversarial positions, and generally refused to extend any cooperation to opposing counsel. As Chairman Ratushny stated in Dagliesh:

> "It would be far more preferable for both counsel to have made full and frank voluntary disclosure prior to the hearing. The prospect of a possible cat and mouse game throughout the course of a hearing is not in the best interests of the administration of justice, nor, in the long run, will it be in the best interests of the party." (Transcript, Vol. IX, p. 40)

## 3. SEXUAL HARASSMENT - THE LAW.

The prohibition against sexual harassment in the Code can be traced to the decision of the Board of Inquiry in Cherie Bell v. Ernest Ladas and Flaming Steer Steak House Tavern, Inc. (1980) 1 C.H.R.R. D/155, (Mr. O. B. Shime, Q.C.). The Board stated there that sexual harassment in the workplace could constitute a breach of paragraph 4(1)(g) of the Code and that prohibited conduct included everything from verbal solicitations to unwelcomed physical contact.

The governing provision of the Code states:

> s. 4(1) No person shall,
> ...
> (b) dismiss or refuse to employ or to continue to employ any person;
> ...
> (g) discriminate against any employee with regard to any term or condition of employment;
> because of ... sex ... of such ... employee.

Thus, in the Cherie Bell case, the Board found that sexual harassment came within the general prohibition against sexual discrimination in relation to terms or conditions of employment. However, in the result, the Board went on to find that on the facts of the case, the complaint had not been established.

Based upon a broad interpretation to the words "term or condition of employment" in paragraph 4(1)(g) of the Code, several complainants have subsequently brought successful complaints of sexual harassment against their employers.

In Meri Coutroubis and Irene Kekatos v. Sklavos (Prof. E. J. Ratushny, June 16, 1981), 2 C.H.R.R. D/457, the Board held that sexual harassment was prohibited under paragraph 4(1)(g) of the Code. Equally, speculated the Board, where complainants are forced to quit their job because of sexual harassment, a complaint may be brought under paragraph 4(1)(b). That is, where complainants choose to leave their employment rather than endure unwelcomed sexual advances, the complainants may be considered to have been dismissed. In effect, in such a situation there is a constructive termination of employment. In such a case, the prohibition against discriminatory dismissal in paragraph 4(1)(b) may be invoked.

The Board of Inquiry, Prof. Ratushny, set forth the incident involving the complainant Coutroubis as follows:

> The Respondent began to "joke" with Meri Coutroubis about her being too young to have lost interest in boys. (She recently had separated from her husband). At approximately 9:00 p.m., while she was working in the dark room, he entered the room and put his arms around her and tried to kiss her. Although she resisted, he succeeded in kissing her. When she started to scream, he released her and she immediately left for home". (D/457)

The incident involving the complainant Kekatos was described as follows:

> Shortly after Mrs. Sklavos left for her holiday in Greece, in late July, the Respondent began to speak suggestively to Irene Kekatos with crude jokes and references to her love life. He also began touching her. She responded with angry looks and asked him to leave her alone. On the Monday in question, he approached her while she was working at the typesetter and spoke in a lewd manner. He then grabbed her with his hands on her breasts and bit her cheek. She began to scream, attracting the Respondent's brother who had been in another part of the building. However, since the door to the room had earlier been locked, he could only knock at the window. The Respondent then stopped and, after some hesitation, gave Irene Kekatos the keys, permitting her to leave. (D/458)

The Board found that there had been "flagrant violations of Section 4(1)(g) of the Code by the Respondent in relation to both complainants" (p. D/458). Professor Ratushny then went on to award the complainants special damages for lost wages and general damages for the psychological injury that they suffered.

The Commission suggested the amount of $750.00 as general damages. Professor Ratushny stated:

> ...(T)his Board is of the view that such an award is reasonable and, if anything, counsel for the Commission exhibited an appropriate restraint in suggesting this figure. The Complainant Coutroubis was a 17 year old girl at the time of the incident and the Respondent was old enough to be her father. While the Complainant Kekatos may not have been as vulnerable, the attack

> upon her was more physically aggressive. The evidence indicates that the incidents have had a severe and lasting effect upon the Complainants up to the present time. An award of $750.00 is not excessive in the circumstances. (D/458).

The next case involving a complaint of sexual harassment was Allison Hughes and Lorry White v. Dollar Snack Bar and Deiter Jeckel (Prof. Robert W. Kerr, August 20, 1981) (1982) 3 C.H.R.R. D/206). There, both complainants testified that they had been victims of the respondent's sexual advances. The failure to comply with their employer's sexual demands, the Board found, resulted in the dismissal of both complainants from their employment.

The Board adopted the reasoning of the Board of Inquiry in the Bell case and then went on to say:

> In my view, harassment based on a factor in respect of which discrimination is unlawful is inherently in violation of the Ontario Human Rights Code since it singles out the victim for treatment on the basis of that factor. (p. 5).

In other words, harassment itself, based upon prohibited grounds under the Code, is proscribed just as are other forms of discrimination upon such grounds. The Board in Hughes referred to its previous decision in Singh v. Domglas (Prof. Robert W. Kerr, 1980) 2 C.H.R.R. D/285 where it had adopted that reasoning in the context of racially motivated harassment. I have taken the same approach in the case of Dhillon v. F. W. Woolworth Limited (Feb. 12, 1982), (1982) 3 C.H.R.R. D/743, in considering whether verbal abuse based upon race, that is, racial name-calling, could give rise to a complaint under the Code.

In Hughes, the Board found both complaints to have been established. The respondent chose neither to appear nor to present evidence. As such, the facts were not in issue. Sexual harassment in the form of trespass to the person was found to have taken place. The Board awarded the complainants compensation for lost wages and general damages for the embarrassment and humiliation that they suffered.

The Board stated with respect to the complainant Huges' harassment:

> Counsel for the Commission asked for an award of $750.00 to Ms. Hughes for the humiliation and embarassment she suffered. Such an award is supported by the recent precedent of the decision in Coutroubis and Kekatos and Sklavos ... This amount is rather larger than recent awards for similar loss suffered in cases of dismissal contrary to the Ontario Human Rights Code, where, as here, there is little evidence of actual substantial suffering by the complainant. However, a larger award is justified in cases of harassment because of the ongoing nature of the wrong done to the complainant throughout the period of harassment. In a case of sexual harassment involving physical contact, the appropriateness of a sizeable award becomes even more apparent when it is recognized that each such contact constitutes a trespass to the person. This does not mean that I am attempting to assess damages for such trespass, but merely serves to confirm the seriousness of the wrong suffered by Ms. Hughes. On the basis of the evidence that Ms. Hughes was subjected to repeated such contact for a period of approximately 3 weeks, the requested $750.00 award is, if anything, conservative. (p. 7)

With respect to Ms. White's damages, Prof, Kerr stated:

> The evidence would suggest that Ms. White was subjected to less extensive harassment by the respondent, if for no other reason than that he appears not to have been present as much during her shifts. On the other hand, in view of the fact that Ms. White was younger (indeed she was still a minor at the relevant time) and was less self-assured than Ms. Hughes, I think it safe to conclude that she suffered as much or more. Even though there was no evidence of substantial suffering, the continuing nature of the harassment over a three-week period and the fact that trespass to the person was involved support a larger than nominal award. This does not mean that I am attempting to assess damages for this trespass, but merely serves to confirm the seriousness of the wrong suffered by Ms. White. Moreover, on at least one occasion, Ms. White suffered actual fear for her safety when the respondent blocked her exit from his office. Again, I think the requested award of $750.00 is, if anything, conservative. (pp. 9-10)

The next case was Teresa Fay Cox and Debbie Coxwell v. Jagbritte, Inc., and Gadhoke (Sept. 28, 1981), (1982) 3. C.H.R.R. D/609. In that case, I traced the development of the jurisprudence in the United States on sexual harassment and found that the approach there is similar to that set forth in the Bell decision. That is, tangible

employment consequences of refusal to comply with sexual advances need not be shown in order for a complaint to be successful. A complainant need only show that the work environment was "poisoned" by the harassment.

In the Cox case, the two complainants chose to leave their employment because of the sexual harassment they suffered. Their employer persistently urged his sexual desires on the complainants and other female employees, when such verbal and physical advances were obviously unwelcomed. It was quite apparent that the respondent employer was acting under the mistaken, sexist, impression that females, despite their resistance to sexual advances, actually enjoyed such behaviour. That the respondent treated his female employees in a sexually discriminatory fashion, as prohibited by the Code, was certain.

Under the circumstances, I awarded the complainants damages for lost wages and substantial general damages for the intimidating hostile and offensive work environment suffered by the complainants.

I found that both complainants (and other employees who were not complainants) had suffered frequent physical harassment by their employer, Gadhoke. I awarded general damages in the amount of $750.00 to the complainant Ms. Cowell and in the amount of $1,500.00 to the complainant Ms. Cox.

> As for general damages, given the circumstances of the sexual harassment, I think substantial general damages should be awarded for the intimidating hostile and offensive work environment suffered by the complainants because of the discrimination toward them. In this regard, it is clear that Ms. Cox especially suffered psychologically, as known to the individual Respondent. (p. 35)

Another case, heard by the same Board as in Hughes, was decided soon after Cox: Lynda Mitchell v. Traveller Inn (Sudbury) Ltd. (Prof. Robert W. Kerr, October 7, 1982) 2 C.H.R.R. D/590. In that case, the complainant had received an offer of employment from the Respondent. When she reported for work, she spoke to the manager of the motel. He, at that time, made certain remarks that she took to be sexually suggestive and that indicated that sexual compliance was to be a condition of her prospective employment. The Board stated in considering whether there had been a breach of the Code:

> There was nothing explicitly sexual about Mr. Czaikowski's remarks, making it at least conceivable that this was simply a case of misunderstanding. On the other hand, harassment does not have to be explicit to be contrary to the Human Rights Code. Harassment can be affected by implication. Stereotyping, the very thing which human rights laws are designed to combat, is actually a facilitator of insult by mere implication. It would be strange if the law allowed harassment to escape its application because, through stereotyping the harassment was implicit, rather than explicit. (p. D/592)

The complainant did not accept the offer of employment. She did not present evidence of any loss of employment income. As such, the Board awarded only general damages for the insult to the complainant's dignity.

> Counsel for the Commission suggested an award of $750.00 for the complainant's injured feelings. If damages in such a case were entirely a matter of first impression, I might be favourable to an award in this amount. However, it is desireable (sic) that Boards of Inquiry be consistent in calculating awards under the Code. In the light of previous awards, I do not think an award of this magnitude can be justified.
>
> ...
>
> While the complainant testified that Mr. Czaikowski had touched her upon the hand there was no evidence she suffered any significant physical assault such as that which led to the awards of $750.00 in Coutroubis and Kekatos v. Sklavos ... and Hughes and White v. Dollar Snack Bar and Jeckel ... Thus, although this case ... involved sexual harassment, the injury suffered by the complainant is more in the nature of that suffered by other individuals who were denied employment on discriminatory grounds. There is no basis for a larger award for the injured feelings than the $100.00 awarded in Imberto v. Vic and Tony Coiffure (Ontario Board of Inquiry, McCamus, 1981) ... (D/592)

In two recent cases I have held that there were breaches of paragraphs 4 (1) (b) and (g) of the Code, finding that there was sexual harassment on the part of the respondent employees.

In Rosanna Torres v. Royalty Kitchenware Limited and Francesco Guerico (April 8, 1982), (1982) 3 C.H.R.R. D/858, the individual Respondent would seek to employ young females as his secretary, submitting each one to sexual advances, and seeking to take advantage of a dependent relationship. His attitude was to persist in advances, and if the secretary did not like the advances she could either leave on her own, or he would terminate her employment after continuing refusal of his advances. The complainant testified she was repeatedly told that she "was beautiful", that the respondent would "please" her as a lover, her hands and arms were touched and stroked, and he would try to kiss her, on one occasion putting her against a wall and pressing his body against her while attempting to kiss her. I awarded her $500.00 for lost wages and $1,000.00 as general damagaes.

I suggested in Torres v. Guerico that the following factors have been considered in the awarding of general damages in cases of sexual harassment.

(i) The nature of the harassment, that is, was it simply verbal or was it physical as well;
(ii) The degree of aggressiveness and physical contact in the harassment;
(iii) The ongoing nature, that is, the time period of the harassment;
(iv) The frequency of the harassment;
(v) The age of the victim;
(vi) The vulnerability of the victim; and
(vii) The psychological impact of the harassment upon the victim. (at D/873)

In McPherson et al., v. Mary's Donuts and Hachib Doshoian (June 21, 1982), (1982) 3 C.H.R.R. D/961, the complainant McPherson, age 19, worked in a donut shop for seven months. She testified that her employer would touch her hands and bottom, attempt to touch her breasts, and on one occasion tried to put his hand down her blouse. As his advances got worse, she was forced to quit. I awarded her $500.00 lost wages, and $1,000.00 as general damages.

In respect of the complainant, Ambo, another young female who worked in the donut shop, she had been bothered with mild touching and sexual suggestions by the employer that made her uncomfortable for the first ten days of her employment. However, the complainant was then sentenced to two months imprisonment for a drug offence, but received the privilege under a Temporary Absence Program of residing in the Elizabeth Fry group home, subject to restrictions upon her movement, and provided she continued to be employed. Knowing of her extremely vulnerable, dependent position,

and that she would return to jail if she ceased to be employed, the employer became more aggresive, hugging her, trying to kiss her neck, and touching her. The clear message of his behaviour toward her was that she was either to accede to his sexual advances or she could go back to jail. Resisting the employer's advances, the complainant was then subjected to unjustified complaints about her work, and insulted, humiliated and embarassed in front of customers, to the point where she quit and returned to jail. I awarded her $2,500.00 as general damages.

In discussing the damages to be awarded to the complainants, I stated (at p. 18)

> There was both verbal and physical harassment in the instant situations. There was considerable psychological agressiveness and some physical contact in the harassment. The time period of harassment in respect of Ms. Ambo was short (a matter of only days) but extremely intensive, while in respect of Ms. McPherson the time period was about seven months, but not as intensive, except for an occasion toward the end of her employment, when Mr. Doshoian was intoxicated. In each case the harassment was regular in its frequency and pervasive in the employment relationship. Both victims were young, Ms. McPherson about 19, and Ms. Ambo, about 24. Both victims were vulnerable, being very dependent upon the employer for their livelihood and, in Ms. Ambo's case, the limited freedom she was allowed from jail under the Temporary Absence Program. In both cases, the psychological impact of the harassment was significantly adverse upon the victims, as was evident from their demeanour in giving their evidence.

The most recent sexual harassment case, Graesser v. Proto (Ontario: July 15, 1983, Prof. Frederick H. Zemans) involved a seventeen year old girl who obtained summer employment with the respondent. On the first two days of employment, the respondent simply sat and stood uncomfortably close to the complainant in his office, but on the third day, he made some sexual suggestions and massaged the complainant's backside, in spite of her objection, in his office. The following morning she resigned, and laid her complaint with the Ontario Human Rights Commission. Similar fact evidence from another female employee corroborated her testimony. The complainant suffered fear and anxieties as a result of her brief period of sexual harassment, perhaps because it triggered latent anxieties and fears associated with having been raped five years earlier. Professor Zemans awarded $750.00 general damages, plus $375.00 for lost wages.

The Ontario cases just discussed illustrate clearly that the prohibition in the Code against sex discrimination in the form of sexual harassment is a far-reaching one. The Code proscribes conduct as blatent and offensive as might constitute a trespass to the person (Hughes; Cox; Coutroubis; Torres; McPherson) and as subtle as implicitly suggestive remarks (Bell; Mitchell). A complaint may be brought under paragraph 4(1)(b) if an employer dismisses or refuses to hire a complainant for her failure to comply with sexual advances (Hughes; Mitchell) or there is constructive dismissal by reason of a complainant's being forced to quit to escape sexual harassment (Torres; McPherson; Graessner) or under paragraph 4(1)(g) if an employer, by sexually harassing employees, imposes discriminatory terms or conditions of employment (Bell; Coutroubis; Hughes; Cox).

However, it is important to keep in mind what Professor Ed Ratushny stated as the Board in Aragona v. Elegant Lamp Co. Ltd. and Fillipitto (August 6, 1982), (1982) 3 C.H.R.R. D/1109 at D/1110,

> ...(S)exual references which are crude or in bad taste, are not necessarily sufficient to constitute a contravention of section 4 of the Code on the basis of sex. The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman. The line will seldom be easy to draw ..."

The law does not inhibit normal discussion or social exchange between people in the same workplace: Torres, supra, at D/858.

The most recent case involving allegations of sexual harassment, Kim Fullerton v. Davey C's Tavern, Glen Relph, and Zantav Limited (Ontario; Aug. 3, 1983: Prof. Frederick H. Zemans), is perhaps illustrative of the difficulty of drawing the line between lawful and unlawful conduct.

The Complainant, age 24, was employed as a waitress at a newly opened Toronto restaurant by the assistant manager, Mr. Relph. After two weeks work, the Complainant and Mr. Relph had dinner together and went dancing, but "nothing unusual took place" and it was "an innocent occasion" (p. 6). The Complainant alleged that after this occasion the assistant manager would ask her out, and on occasion put his arm around her and attempted to kiss her. He denied any sexual intent. She felt she had been directly sexually propositioned on one occasion after about a month of working, but the assistant manager respondent claimed that if he had suggested anything, it was obviously

in jest. The Chairman felt that Mr. Relph "may very well have been testing the waters" with the Complainant (at p. 12). Shortly thereafter the Complainant was transferred to a less lucrative part of the restaurant facilities, and then she was dismissed, and she inferred that her demotion and dismissal were related to her rejection of what she perceived to be sexual advances by the assistant manager. However, the evidence of the owner of the business was that he, quite independently, had observed the Complainant's dress and demeanor as a waitress over a period of time, and that he found them to be unsatisfactory, and noticed on an occasion that she seemed to be lacking in personal hygiene as she had an unpleasant body odour, so that he instructed the general manager to terminate her employment forthwith.

Other witnesses confirmed these observations of the Complainant. The Chairman concluded there was not sufficient evidence to indicate that the assistant manager had treated the Complainant "in a fashion that went beyond that of a reasonable social involvement" (at p. 25) and therefore dismissed the Complaint because there was not sexual harassment in the workplace prohibited by paragraph 4(1)(g) of the Code, and found further that she was not dismissed from her employment because of any refusal of sexual advances, prohibited by paragraph 4(1)(b) of the Code.

In Aragona, supra, the complainant, an artist in the art department of the corporate respondent, complained of frequent, verbal harassment with sexual connotations. After a thorough analysis of the evidence, the Board concluded,

> The evidence as to (the complainant) Mrs. Aragona's reaction was conflicting. She claims that she told Mr. Fillipitto that she did not appreciate the comments but that he treated her responses as a joke. He stated that she never complained to him but when he joked, she would joke back. It is obvious that what Mrs. Aragona perceived to be an expression of her disapproval, Mr. Fillipitto perceived to be a joking response. Perhaps that is understandable considering the spontaneous nature of the comments, his command of English and the fact that the normal response was not meant to be taken seriously. ... Heather McLeod could remember nothing done by Mrs. Aragona to discourage the conduct in question. On the contrary, she stated that she would "go along with it". No evidence, apart from that of Mrs. Aragona herself, was presented to indicate that she had expressed her disapproval to Mr. Filipitto. He testified that if she had told him to stop joking he would have done so and there is no reason to disbelieve this testimony. (at p. 15).

> In all of these circumstances, this Board is of the view that the evidence presented does not establish that any party has contravened the Ontario Human Rights Code.

There is no doubt that Boards of Inquiry, by their creative interpretations of the Human Rights Code, have made a substantial penetration into the workplace in order to eradicate an insidious form of discrimination. As the Board of Inquiry (O. B. Shime, Q.C.) said in Bell:

> There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment. (p. D/156)

It appears that the Ontario Legislature approves of the interpretation given to the old Code by Boards of Inquiry in respect of the matter of sexual harassment. In the Human Rights Code, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982, (the new "Code"), there are specific provisions proscribing sexual harassment in the workplace:

> 6. (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
>
> (3) Every person has a right to be free from,
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
>
> (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.
>
> ...

9. (f) "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

Sexual harassment has also been held to be unlawful under human rights' legislation in other jurisdictions in Canada.

In an Alberta case, Deisting v. Dollar Pizza (1978) Ltd, et al., (April 29, 1982, C. P. Clarke), (1982), 3 C.H.R.R. D/898, the complainant successfully alleged sexual harassment in contravention of paragraph 6(1)(b) (now paragraph 7(1)(b)) of The Individual Rights Protection Act, c. I-2, R.S.A. 1980. The complainant, who worked in the respondents' restaurant, said that the individual respondent, Papaconstantinou, grabbed her and kissed her, and that the other individual respondent, Nickolakis, tried to massage her shoulders, kiss her, put his hand down the front of her dress, and on her leg, and pressed himself against her buttocks. The Board of Inquiry held that paragraph 6(1)(b) (now paragraph 7(1)(b)) of the Alberta legislation is essentially the same as section 4 of the Ontario Code, which has been interpreted by Ontario Boards of Inquiry to cover sexual harassment. The complainant was awarded lost wages and $1,000.00 as general damages "for embarassment and humiliation".

In Manitoba, a Board of Adjudications in Hufnagel v. Osma Enterprises Ltd., (April 23, 1982, Paul S. Teskey), (1982) 3 C.H.R.R. D/922, has held that subsection 6(1) of the Manitoba Human Rights Act, C.C.S.M., c. H175 (which is essentially similar to section 4 of the Ontario Code) includes a prohibition of sexual harassment.

The first case to deal with sexual harassment under the Canadian Human Rights Act was Robichaud et al., v. Brennan et al., (1982) 3 C.H.R.R. D/977. The Tribunal held that section 7 prohibited sexual harassment, but that on the facts there was no discrimination. The Review Tribunal (February 14, 1983, M. Lois Dyer, Paul L. Mullins, and M. Wendy Robson) reached the opposite conclusion on the facts, finding sexual harassment. The Review Tribunal did not disagree with the Tribunal's analysis (at para. 8717) of the nature of sexual harassment prohibited under paragraph 7(b) of the federal Act.

> "In my opinion, formed largely by a perusal of the cases cited earlier in this Decision, the pertinent distinctive characteristics of the sexual encounters which must be considered to be prohibited by Section 7(b) of the Act are, first, that they be unsolicited by the complainant, and unwelcome to the complainant and expressly or implicitly known to be unwelcome by the respondent.

> (These are the factors which remove the situation from the normal social interchange, flirtation or even intimate sexual conduct which Parliament cannot have intended to have denied to supervisors and the people they supervise in the workplace). Secondly, the conduct complained of must be persisted in in the face of protests by the subject of the sexual advances, or in the alternative, though the conduct was not persistent, the rejection of the conduct had adverse employment consequences. Thirdly, if the complainant cooperates with the alleged harassment, sexual harassment can still be found if such compliance is shown to have been secured by employment-related threats or, perhaps, promises."

A subsequent case dealing with the federal legislation, Kotyk and Allary v. Canadian Employment and Immigration Commission and Jack Chuba (April 28, 1983, Susan M. Ashley), (1982) 4 C.H.R.R. D/285, has held also that sexual harassment is prohibited by section 7. In this case, the Tribunal found that the individual respondent, the manager of an office of the Canada Employment Centre in Yorkton, Saskatchewan, had made unsolicited and unwelcome sexual advances to the complainant Kotyk employed under his supervision, and that she feared her employment would be jeopardized if she refused his advances (at p. 33) to the point of having sexual intercourse with him on an occasion (at p. 44). In respect of a second complainant, Allary, the individual respondent had sexually propositioned her on three separate occasions while on working trips (at p. 34). Although her job was not threatened, she was forced to use her own car, at her own expense, while travelling, to avoid being with the individual respondent. The Tribunal awarded the complainant, Kotyk, $2,500.00 in general damages, and the complainant, Allary, $100.00 as general damages.

It should be noted as well that the Canadian Human Rights Act, by recent amendment (1980 - 81 - 82 -83, c. 143, s. 7) now provides in section 13.1 expressly that sexual harassment is deemed to be harassment on a prohibited ground of discrimination.

**4. THE EVIDENCE.**

Commodore's plant at 946 Warden Avenue, Toronto, operated 24 hours a day at all material times, with three shifts. Mr. DeFilippis was the foreman of the afternoon shift, which was from 4:00 p.m. to 12:30 a.m., and was in charge of the plant during the shift after the plant manager, Mr. Vince Long, left for the day, which was generally about 5:00 p.m. Although other individuals (the "lead hands" and "set up" persons) had supervisory positions in the various activities of the plant, it is obvious that Mr. DeFilippis had both overall control during the afternoon shift and also gave direct supervision to some employees. (Transcript vol. 1, p. 80). There were about 50 workers during the shift, including about 10 females, all being unskilled labourers receiving about $4.00 per hour. Many of the employees are immigrants who do not speak much English. All six Complainants speak Spanish and testified through an interpreter, although all speak some English.

My Appointments as a Board of Inquiry were filed as exhibits (re: Mrs. Edilma Olarte - Exhibit # 1; Mrs. Eneyda Mejia - Exhibit # 2; Mrs. Edilma Biljak - Exhibit # 3; Mrs. Maria Magnolia Estrada - Exhibit # 4; Mrs. Elvira Benel - Exhibit # 5; and Mrs. Yolanda Munoz - Exhibit # 6). As well, the six Complainants' Complaints were filed as exhibits (Mrs. Edilma Olarte - Exhibit # 7; Mrs. Eneyda Mejia - Exhibit # 8; Mrs. Edilma Biljak - Exhibit # 9; Mrs. Maria Estrada - Exhibit # 10; Mrs. Elvira Benel - Exhibit # 11; and Mrs. Yolanda Munoz - Exhibit # 12). The Complaints filed as exhibits were dated in 1981 and 1982 but were in fact amended complaints in respect of earlier complaints originally signed in 1979, but the later Complaints (i.e., the ones filed as Exhibits # 7 to #12) had added Rafael DeFilippis as a named individual Respondent. The earlier complaints, signed in 1979, were also filed as exhibits (Mrs. Edilma Olarte - Exhibit # 7A; Mrs. Eneyda Mejia - Exhibit # 8A; Mrs. Edilma Biljak - Exhibit # 9A; Mrs. Maria Estrada - Exhibit # 10A; Mrs. Elvira Benel - Exhibit # 11A; and Mrs. Yolanda Munoz - Exhibit # 12A).

Mr. DeFilippis became foreman at Commodore's Warden Avenue plant in 1973. His references suggest that he had a good previous production record as a forman at Teledyne Still-Man Mfg., (Canada) Ltd. (Exhibits # 77 and # 78), and he has been held in very high regard by all the management of Commodore in respect of his work there.

Mr. Edward Kellow, President and General Manager of Commodore, described Mr. DeFilippis as a tough, productive, far superior, foreman. It was obvious

from all the evidence that from the standpoint of productivity, Mr. DeFilippis has been a very good foreman and a valued employee. As foreman, Mr. DeFilippis would hire and fire employees. He hired perhaps as many as two hundred over the years, with roughly twenty percent being women. There are approximately 40 to 48 people working on a shift. Commodore has fairly short production runs, so that the assembly line shifts often from one product to another. Thus, employees are often assigned from department to department by Mr. DeFilippis, and the number of employees within each department fluctuates, depending upon the demands of production. As well, there are often people away from work, which requires re-assignment of others. Once within a department, a worker is generally assigned to the particular machine or position within the department by the 'lead hand' or 'set-up' man for that department, although Mr. DeFilippis would sometimes make these assignments as well. The production of a product generally starts with the 'punch press' department, moves to the 'brake press' department, thence to the 'spot welding' department, followed by the 'paint' department, and finally the assembly or 'packing' department. A 'view' was taken of the Warden Avenue plant. A sketch (Exhibit # 63) of the floor plan was introduced in evidence, as well as the actual blueprint (Exhibit # 62). The factory is noisy due to the machines in the sense that it would be difficult for one worker to hear another unless they are very close to each other. Mr. DeFilippis' office, on the south side of the plant, is separated by a passageway from a secretary's office which in turn has the plant manager's office behind (to the west of) it. The passageway has a door at the northern end that shuts by itself, so that one cannot see into Mr. DeFilippis' office from the factory floor. The secretary in the adjacent office, and the plant manager, have generally left the factory by 5:00 p.m. Mr. DeFilippis is, in effect, the acting plant manager for the balance of his shift.

Workers were on a three month probation period, and in 1978 started at $3.85/hour, rising to $4.00/hour after the three month probation (plus becoming entitled then to the benefits package) and receiving automatic periodic raises thereafter.

Mr. DeFilippis, now 43 years old, is married with a family. He immigrated to Canada from Italy in 1964, and became a Canadian citizen in 1969. He graduated from grade 12 in high school in Italy, and it is obvious from listening to him testify that he is an intelligent person. He has worked hard in his jobs.

Mr. DeFilippis seems to have been promoted to "Assistant Marketing Manager" in March 1981 (Exhibits # 56, 57) (although senior management, while aware of his promotion, were unsure in their testimony as to the specifics of his formal title), and has a present annual salary of $28,350.00.

Maria Edilma Olarte is 37, married, with two children. She emigrated from Colombia about 1972, and speaks Spanish, but little English. She began work with Commodore in the punch press section and the packaging department about November 28, 1978 on the afternoon shift (Transcript vol. I, p. 112). Her Complaint (Exhibit # 7) states that on the first day Mr. DeFilippis "asked me if I wanted to go with him to a secret room in the plant", and the following day he "grabbed my shoulders and attempted to kiss me" (Transcript vol. I, pp. 59, 60, 94) while completing a form in his office. She testified that Mr. DeFilippis asked her "on a daily basis" to go out with him, to have coffee with him, and to visit her apartment. (Transcript, vol. I, p. 60).

Her Complaint stated further:

> In January of 1979, Rafael sent me behind the plant to fold boxes. He then followed me out and told me that we would have sexual intercourse together since nobody was there to see. I was frightened because there was nobody around and he was trying to catch me. Then a man came into our area and Rafael went back to his office.
>
> Between the time I started work and the middle of January, Rafael asked me to go out with him, or to have coffee with him or if he could come to my apartment on a daily baisis. He also told me I was a good worker. After the above incident in January, he began to shout at me and criticize my work for no reason. Occasionally there was no material to feed my machine at work. At those times, he would yell at me for not working and criticize me even though I had no control over the situation. Because this change of behaviour towards me started after I had clearly rejected his advances a number of times, I believe that my rejection was the reason for his change of behaviour. In January of 1979, I became extremely anxious as a result of Rafael's conduct. I was constantly afraid that he would either make sexual advances to me or harass me unreasonably about my work. I asked the foreman of another shift if I could transfer from the 4:30 p.m. to 12:30 a.m. shift for this reason. He told me that it couldn't be done because Rafael would be very angry as he considered the women workers on his shift to be 'his women'. Finally, the stress of the situation became intolerable to me, and after discussing the matter with my husband, I quit my job on January 26, 1979. (Transcript, vol. I, p. 60).

Her evidence before the Tribunal reiterated her Complaint (Transcript, vol. I, pp. 66 to 77). She said that while her hands were restricted by safety lines to one of

the machines that he would touch her (Transcript, vol. I, p. 82). She testified that on one occasion she was in Mr. DeFilippis' office alone with him to answer a phone call when her son had been hurt in a bicycle fall. Mrs. Olarte testified that after he tried to calm her down, as she was upset and crying over her son's misfortune, he tried to kiss her (Transcript, vol. I, pp. 95, 96). The plant office of Mr. DeFilippis is fairly private after 5:00 p.m., when the door to the plant is closed, no one being able to see into the office from the factory floor (Transcript, vol. II, p. 97).

Mrs. Olarte says that she sought a transfer to another shift by approaching another foreman, but when told that Mr. DeFilippis had control over a transfer, quit because she could no longer tolerate Mr. DeFilippis' criticism of her any more, which she believed resulted from her rejection of his sexual advances. (Transcript, vol. I, pp. 67, 68).

Mrs. Olarte found new employment six or seven months after quitting her job with Commodore. Her complaint was not made until July 27, 1979, after learning that a co-worker and friend, Mrs. Eneyda Mejia, had filed a complaint. (Transcript, vol. I, pp. 118, 119, 123, 127). Mrs. Olarte quit about January 26, 1979, so that she only worked about seven weeks in all.

Mrs. Olarte complained about her problems to a co-worker who spoke Spanish, Mr. Jorge Plaza, (Transcript, vol. I, pp. 112, 113). Jorge Perez worked at Commodore in its painting department from September, 1978 to May, 1979. He testified that Mrs. Olarte had complained to him in December 1978 or January 1979 about the advances of Mr. DeFilippis and that she was very upset (Transcript, vol. II, pp. 14, 15). He also testified that Mrs. Mejia had similarly complained about Mr. DeFilippis' advances (Transcript, vol. II, pp. 16 - 19).

He also stated that he was present at a meeting with Mrs. Mejia and Mr. Long, shortly after she had been fired, when Mrs. Mejia complained about the advances of Mr. DeFilippis and that she felt her rejection of him had resulted in her being fired. (Transcript, vol. II, pp. 24, 25). Mr. Perez spoke forcefully, with emotion in giving his testimony, with some bitterness toward Mr. DeFilippis, but he was a truthful witness.

Mrs. Irma Farfan testified. She had immigrated to Canada from Guatemala in 1974, is Spanish-speaking, and worked in the packing department and on machines at Commodore from September, 1978, to March, 1979, on the night shift (12:30 a.m. to 7:30 a.m.) under Joe Carriero, as supervisor (Transcript, vol. II, p. 67). She testified that on arriving early for work one morning, about six days after she started working, Mr. DeFilippis asked her into his office.

A. I was sitting down at the table in the dining room when he came to me and asked me "Do you know of any friend of yours that wants to work?"
And then I said, "Yes, I do. Would you allow me to make a telephone call?"
I made the telephone call. My friend wasn't there, and he asked me to sit down at a chair in the office, and he asked me would I like to go out with him.
I said "No, I have come here to work, not to look for a man."
He said he had read in my application form that I was separated, and he said that he knew that all of us women from South America liked to have other men, apart from our husband, so I got mad, and left the office, and slammed the office door.

Mr. DeFilippis denied he had ever propositioned Mrs. Farfan, adding the observation that "she could be my mother." Mrs. Farfan knew the Complainants as co-workers, but they were not personal friends (Transcript, vol. II, p. 69).

The Complainant, Eneyda Mejia, came to Canada from Colombia March 1, 1973. She is divorced, with four children. Mrs. Mejia started work with Commodore about October 31, 1978 and worked there until May 4, 1979. She reiterated her Complaint (Exhibit # 8), (Transcript, vol. II, pp. 80 - 83), alleging sexual advances by Mr. DeFilippis, testifying that he tried to kiss, hug and touch her, while at work, and asked her to have sexual intercourse with him. She said that he told her she "needed a boyfriend" because she was divorced. (Transcript, vol. II, pp. 130, 131). She felt that once he knew he could not succeed with her he harassed her in her job on a daily basis.

Mrs. Mejia testified:

The first night that I made the application, he stood there, because he always makes this gesture (indicating), and he told me "You are beautiful. You have beautiful eyes."

I accepted that, as a conversation, and left it as such.

Later, a month later, he called me to his office, and he made advances at me. He asked if I could go out with him.

I replied this way, "Rafael, excuse me. I am the mother of four children. I am here, working in the night shift, so that I can provide my children with food. I have not come here to look for a man, because if that was the reason, I wouldn't have any reason to be looking for a job."

Q. What do you mean by "sexual advances"?
A. He said, "Because you are a divorced woman, you need a boyfriend."

That is when I said "I am the mother of four children. That is problem enough for me."

Later he tried to to hug me and kiss me, but I left the office.
(Transcript, vol. II, pp. 84, 85).

She stated that on another occasion Mr. DeFilippis tried to hug her and touched her breasts, and "the area close to my vagina". (Transcript, vol. II, pp. 85, 98, 99). On another occasion she said he called her into his office to take a telephone call.

Later on he called me into his office again. He got close to my machine, because I used to work in this machine where there are these safety straps, saying that there was a call for me, that it was my son.

As I was speaking on the phone, I was almost hanging up because what I spoke with my son was very little, he got close to me, and said "Sit down here."

I did not sit down. I remained standing up, next to the desk that was there.

He came to me and said, "Do you want condensed milk?" and because I know that this is a factory that does not deal with milk, but iron, I looked around to see if there boxes, and he told me "If you go to the next office, I will give you condensed milk there."

Q. What did you think he meant by that?
A. I am not a child. I am a married woman. I have had children.

I think that what he meant was to have sexual relationships in the other office.

I truly then, and today, feel demoralized to know that somebody is not able to work in peace.

Q. After these advances, Mrs. Mejia, did you have problems with harassment on the job?
A. Every day he would harass me. He would scream at me. He would change my jobs.

Q. Why do you think he did this?
A. He changed his attitude towards me when he found that he couldn't get anything from me. He changed from night to day.
(Transcript, vol. II, pp. 85, 86).

Mrs. Mejia testified that while she was "tied" to machines by way of safety straps on her arms, Mr. DeFilippis would come up behind her and touch her. (Transcript, vol. II, p. 103). These safety straps inhibit a worker from putting her arms into a machine, but otherwise there is freedom of movement.

She testified that after Mr. DeFilippis knew he would not be successful in his advances towards her that he became very critical of her work, often screaming at her, changing her from machine to machine, and made life "impossible" for her, (Transcript, vol. II, pp. 132 - 143). Mrs. Mejia broke down and cried at different points in her testimony. There can be no doubt that her relationship with Mr. DeFilippis affected her greatly.

She testified that the lead hand in her section, Leslie Grunwald, said he had orders from Mr. DeFilippis to have her "change from machine to machine" and to yell at her. (Transcript, vol. II, pp. 136, 137). Mr. Grunwald and Mr. DeFilippis denied this.

Mrs. Mejia testified that on May 4, 1979, that she asked Mr. DeFilippis to be transferred from the machine she was working on because it was irritating an injury, but Mr. DeFilippis fired her. Mrs. Mejia felt she was fired because she had rejected Mr. DeFilippis' advances (Transcript, vol. II, pp. 87, 88). She testified that she later, on May 8, had a meeting with Mr. Long, at which meeting Mr. Perez was present, at which time she complained of Mr. DeFilippis' advances, but received no redress, (Transcript, vol. II, pp. 91 - 93).

Mrs. Mejia obtained new employment some six months after being fired from Commodore May 4, 1979 (Transcript, vol. II, p. 104).

In his testimony, Mr. DeFilippis denied that he had made any advances to Mrs. Mejia, saying that she in fact had invited him over for coffee, but he had not accepted her invitation. He said that on a Friday night, (May 4), when he allegedly fired her, that he in fact merely suspended her for disobeying orders, and that after consoling her she "gave (him) a kiss" and left saying that she would see him Monday, but when she returned on Tuesday, she went directly to the plant manager, Mr. Long, accusing Mr. DeFilippis of harassment. He claimed she quit her employment, and was not fired.

Jorge Ramirez, age 23, testified that he worked on two occasions for Commodore at its Warden plant during 1978 and 1979. He stated:

> Q. Did Rafael DeFilippis ever ask you to bring employees to him?
> A. Yes.
>
> Q. What did he say about that?
> A. He asked me if I had female friends. He asked me to look for female personnel to work to see if it was possible to give them jobs; that he would look after that for me to provide him with telephone numbers. He told me, 'if I like them I will give them jobs. If not, I won't.
>
> Q. Did he say what he meant by 'if I like them'? Was he more specific?
> A. He meant if he like the women for making love.
>
> Q. Did he say that to you?
> A. Oh, yes.
>
> Q. Did he indicate what he would do if they did not make love?
> A. The woman that was not willing to make love to him or that didn't like him, he would fire or he would upset in such a way that they would leave.
>
> Q. Did he tell you that?
> A. Oh, yes.
>
> Q. Did he tell you that on more than one occasion?
> A. Oh, yes, many times.
>
> (Transcript, vol. III, pp. 8, 9).

...

> Q. So he told you that there was a secret room in the plant where he would make love to the women?
> A. Yes, many times.

Q. And he asked you to bring women who would make love to him, and if they didn't make love to him he would fire them?
A. Yes.

(Transcript, vol. III, pp. 10, 11).

Mr. Ramirez testified that several women in the factory, including the Complainants, Mejia, Biljak and Benel, complained of Mr. DeFilippis making advances and upsetting them. (Transcript, Vol. III, pp. 14-17, 19-20, 29, 32, 48-51, 60).

Marina Vivanco, who worked at Commodore's Warden plant in packing from August 1978 to August 1979, testified. She immigrated to Canada from Ecuador about 1974, and is married with two children. She worked on the day shift under Mr. DeFilippis. She testified in Spanish, through the interpreter:

A. When I first started working in the company, he was bothering me many times.

Q. Go ahead.
A. Because I used to work with a gun to put the screws on the doors of the cabinets, he used to tell me 'that is a good gun' but that he had a better one. He said, 'go to my office and I can show you', but I never went into his office. Because I kept asking him to stop bothering me this way. I am a married woman and I have two children.

Q. When did he start to bother you?
A. When I first started to work.

Q. How long did these incidents occur? For which time period.
A. During two (2) months.

(Transcript, vol. III, pp. 64, 65).

...

Q. Can you describe to us anything else he said to you?
A. Yes. On the occasion of the strike of TTC, I had explained to him that I was going to get to work late because I did not have the means of transportation to arrive to work at the right time. I advised him that I would be arriving to

> work around 5:30 because I had to wait for my husband to give me a drive to work...a ride to work. He told me that there was no problem, that it was okay.
>
> But on the last day of the strike, when I arrived to the factory and looked for my card in order to punch it, my card was not there. I walked into his office and asked Rafael 'where is my card?'. He said, 'I have it here'. Then he grabbed me by the shoulders and hold me because he wanted to kiss me on my lips. He got a hold of the card and signed it as if I had entered work at 4:00. As I left his office, I got hold of my card and I punch it at the time 5:30 and I went back to work. (Transcript, vol. III, pp. 65, 66).

Mrs. Vivanco also stated that Mrs. Mejia had told her, after Mrs. Mejia had ceased to work at Commodore, about Mrs. Mejia's problems with Mr. DeFilippis (Transcript, vol. III, pp. 67, 68) and that two other female workers, Norheim Molina and Beatrix de la Cueva, had similarly complained about Mr. DeFilippis' sexual advances (Transcript, vol. III, pp. 68, 69).

The Complainant, Edilma Biljak, also testified through the Spanish interpreter. She had worked at Commodore's Warden plant from August 1977 to June 13, 1979. From April 7, 1978 to October 26, 1978, she was on maternity leave. Mrs. Biljak is married with one child. She reiterated and elaborated (Transcript, vol. III, pp. 93-104, 122) upon her Complaint (Exhibit # 9) which states, in part:

> Approximately two weeks after I started working, the foreman, Rafael, approached me and asked me if I was married. When I replied yes, he asked me what times my husband worked. When he learned that my husband worked on the day shift, he told me he could go to my apartment during the day to meet me. I refused. About this time I was working on a machine and Rafael came up behind me and put his hands on my shoulders. In October of 1976, I cut my hand while at work. I was afraid to go to the office for medical help because of Rafael's previous comments and conduct. However, another woman called him and I went to his office. While he was treating my hand, he tried to kiss me. Shortly after this, I became pregant and Rafael stopped making sexual advances to me. However, he now began to push me to work

> faster and gave me heavier work. He transferred me from one machine to another frequently during my shift. In February and March of 1977, when I was five months pregnant, he assigned me to welding. It is extremely unusual for a woman to be assigned to welding in this factory. He also started criticizing my work and shouting at me. He continued to push me to hurry up and harass me about my work. He watched me when I went to the women's washroom and waited outside for me, timing how long I spent in there. Because his treatment of me like this started only after I rejected his sexual advances, I believe it was a result of this rejection.
> (Transcript, vol. III, pp. 90, 91).

She said that the Complainants Estrada, Mejia, Munoz and Olarte had all complained to her about Mr. DeFilippis' sexual advances. (Transcript, vol. III, pp. 105 - 108). Mrs. Beljak left Commodore to go on maternity leave in April, 1978, and returned in October, 1978, only to become ill June 13, 1979, at which time she left for good, due to her illness. She alleged that she had considerable difficulty collecting her vacation pay which she felt was due to Mr. DeFilippis not liking her, (Transcript. vol. III, pp. 102, 103, 115; Exhibits 19, 20, 21) and never did receive sick benefits.

Mr. DeFilippis denied that he made any sexual advances toward Mrs. Biljak. She seems to have been regarded by him generally as a good worker.

Mr. Julio Biljak, husband to the Complainant, Edilma Biljak, testified through a Spanish interpreter. He said his wife had complained to him about heavy work assignments. She did not complain to him about sexual harassment by Mr. DeFilippis until he learned of her signed complaint in June 1979. He said he was a jealous person and that she was nervous and crying and worried that now that her husband knew he would "come crazy and do something wrong" (Transcript, vol. IV, p. 9). Mr. Biljak testified that he called Mr. DeFilippis several times (Exhibit # 24, Transcript, vol. IV, pp. 11-12) to obtain her vacation and sick benefits while she was away from work for a gall bladder operation, and also attended at Mr. DeFilippis' office, and while he had considerable difficulties his wife eventually received her vacation pay some months later (Exhibit # 20) even though the cheque was dated much earlier. Miss Christine Wood, payroll and personnel records officer, later testified that all vacation pay was paid at one point in the year.

Anna Mercedes Gomez testified through the Spanish interpreter. She is from Colombia, married with two children, came to Canada in 1975, and began working at Commodore's Warden Avenue plant in 1977 on the afternoon shift under Mr. DeFilippis as her supervisor. She testified that he made sexual propositions within a few days of her starting work there, that he enticed her into his office when she needed gloves on an occasion, held her hands and kissed her, and touched her breasts. (Transcript, vol. IV, pp. 44-45). She said that when she got back to her machine, shaking and crying, he came to her asking why she was crying and left "laughing very cynically" (Transcript, vol. IV, p. 45). She felt that from that time on the lead hand for her section, Mr. Plaza, made life impossible for her, and she testified that Plaza implied to her that Mr. DeFilippis was behind Plaza's criticism (Transcript, vol. IV, pp. 46-51), and she said she eventually quit her job because of this treatment. Mrs. Gomez impressed me as being a truthful witness.

The Complainant, Maria Magnolia Estrada, is married with one child. She immigrated to Canada from Colombia in December, 1976. She reiterated her Complaint (Exhibit # 4) in her testimony (Transcript, vol. IV, pp. 61-63). She said she began work under Mr. DeFilippis on April 13, 1978 who shortly thereafter "began to make personal comments to me about my appearance and my social life" which continued on a daily basis. She said he asked if her husband was working in the morning and if so he could "go with you to your apartment". (Transcript, vol. IV, p. 149). She said in June, 1978, he made a sexual proposal to her and attempted to kiss her. She said she rejected his advances, and asked him to respect her, as she came to Commodore "only to work". She testified he tried to kiss her in his office, embraced her, and touched her breasts. Mrs. Estrada said that Mr. DeFilippis' conduct toward her subsequently changed, and that he constantly criticized and screamed at her and transferred her to the department he knew she disliked.

She filed a complaint with the Ontario Human Rights Commission June 27, 1979, and was called to a meeting with the President of Commodore, Mr. Edward Kellow, with Mr. DeFilippis present, August 8, 1979, to explain her Complaint, but that nothing changed in terms of criticism and rudeness, although there were no further sexual propositions, and the "situation became unbearable" so that she quit October 5, 1979. (Transcript, vol. IV, pp. 75, 77, 81, 86). However, she said that Mr. Kellow had told her at the meeting that if she had further problems with Mr. DeFilippis, she was to tell management. (Transcript vol. IV, p. 83). Mrs. Estrada said that Mr. Kellow appeared to her to be a sincere person (Transcript, vol. IV, p. 100). Mrs. Estrada did not go to management or contact the Human Rights Commission before quitting October 5, 1979.

She testified that she delayed in filing her Complaint because she did not want to lose her job and needed it (Transcript, vol. iv. pp. 68, 70). Mrs. Estrada said she knew Mrs. Mejia had had similar problems with Mr. DeFilippis (Transcript, vol. IV. p. 72) and had left Commodore, but she had heard that Mrs. Mejia had filed a complaint so she obtained Mrs. Mejia's phone number, called her, and subsequently initiated her Complaint.

Mr. DeFilippis denied that he had in any way sexually harassed Mrs. Estrada. He said he had admitted at the August 8, 1979, meeting with Mr. Kellow and Mrs. Estrada that he had once commented upon her pretty dress and touched her face, but said it was meant as a friendly compliment and was not a gesture with a sexual connotation. It is clear from Mr. DeFilippis' own evidence that the Complainants Benel, Biljak, Estrada, Mejia and Munoz were complaining to him all the time that he had changed for the worse in his attitude toward them. Whatever the reasons underlying their views, it is clear at the least that they held an honest perception in 1979 that he was treating them unfairly.

Mr. DeFilippis attempted to attack the character of the Complainants and their witnesses, throughout his testimony. He accused some of them of what he was being accused of, sexual advances, at the same time as he denied their accusations about him. For example, he asserted that Mrs. Mejia had twice asked him over for coffee, that another witness, Mrs. Tsfantakis, had propositioned him while her husband was away, asking him over to her house one Friday night and that several of the women had loose morals, and were seeing other male workers. He asserted, in seeking to contradict some of the female witnesses' testimony, that he never showed pornographic pictures, as they alleged, but that a female worker, Rosa Morra once showed him such pictures asking if he "was still interested in girls". He claimed that many had complained about him in this hearing with the hope of financial gain, or because he had disciplined them at work, or terminated their employment.

The Complainant, Elvira Benel, a single person, immigrated to Canada in 1977 from Peru, commencing work at Commodore's Warden Avenue plant about February 6, 1979 on Mr. DeFilippis' shift, and worked at Commodore until June 13, 1979. In her Complaint (Exhibit # 11) she says Mr. DeFilippis asked her almost daily to go out with him and that:

> "he also attempted to kiss me, to sexually proposition me and to touch my body on many occasions.
> (Transcript, vol. V, p. 7).

She felt that by May, 1979, her continuing refusals and indifference to him had led to excessive criticism by him of her work, and that her problems with him led to her dismissal on June 13, 1979. She testified that Mr. DeFilippis fired her when he learned June 13, 1979 that she had delivered a letter (Exhibit # 61) to the manager that day, saying that there was to be an investigation by the Ontario Human Rights Commission of her allegation that DeFilippis was harassing her (Transcript, vol. V, pp. 25, 26). Mr. Sian, her 'lead hand', Mr. Long, and Mr. DeFilippis all had a different version in their evidence given later. Mr. Sian said that on June 12, she was not working carefully on her machine, and refused to clean it at the end of the shift, that he criticized her and told the foreman. Mr. Sian felt that Ms. Benel was not doing what she had been asked to do by her immediate supervisor, the lead hand. She had a perception as to being persecuted by Mr. DeFilippis in the situation and that he was behind her being ordered to do certain tasks. She had some days previously had her brother call the manager, Mr. Long, to try to get Mr. DeFilippis to stop picking on her.

Mr. Sian testified that the next day, June 13, she refused to work shortly after she began, and Sian reported her to Mr. DeFilippis. Mr. Long said that Mr. DeFilippis came into his office advising that Mr. Sian had come and complained to him about Ms. Benel and Mr. DeFilippis also said she had not been working properly generally, so Mr. Long told Mr. DeFilippis to fire her which he then did. However, Ms. Benel had delivered the letter (Exhibit # 61) from her lawyer to Mr. Long about one-half hour before she was fired by Mr. DeFilippis. She testified she was fired by Mr. DeFilippis for delivering the letter.

Ms. Benel said that she did not complain to management about Mr. DeFilippis' sexual harassment because she was embarrassed, could not speak English, and felt that if an interpreter was used "many other people would have found about this" (Transcript, vol. V, p. 112).

Mr. DeFilippis claimed that he had once met Ms. Benel socially some five or six months before she came to Commodore, through another worker, and that he had gone to her apartment after having drinks with the other worker and the other worker's girlfriend. Ms. Benel denied ever meeting Mr. DeFilippis before coming to Commodore, or knowing the other worker (Transcript, vol. V, p. 41). Ms. Cleo Arias, another female worker, who was the girlfriend of Mr. DeFilippis, later testified for the Respondents. Cleo Arias' testimony was that DeFilippis had once said to her that "he had slept with

Mrs. Benel before she had started work at Commodore". I accept Ms. Benel's testimony on this point.

The Complainant, Yolanda Munoz, is married with one child. She came from Colombia to Canada in 1972, and started work with Commodore June 17, 1978, under Mr. DeFilippis as her foreman. Her Complaint (Exhibit # 12) states:

> During my first week working for this company, the foreman of the 4:00 p.m. to 12:30 a.m. shift, whose first name was Rafael, sent me to get something from the shipping room. While I was in the shipping room, he held my shoulders and tried to kiss me. I told him to stop because I was married. He told me that my husband was not here and that I needed someone to love me. I pushed him away.
> (Transcript, vol. V, pp. 126, 131).

She complained that he frequently asked her out, said he wanted to meet her after work "to have sexual intercourse" (Transcript, vol. V, p. 136), and on one occasion "attempted to kiss " her in his office. She said he would say to her as he would pass her while she was working, "What beautiful lips you have. I want lips to be kissed." (Transcript, vol. V. p. 132). On another occasion when she and another lady, Cleo Arias, who was Mr. DeFilippis' girlfriend, were working at the back of the factory in the shipping room, Mrs. Munoz said Mr. DeFilippis arrived and kissed and embraced the other lady in front of Mrs. Munoz, saying to Mrs. Munoz "this is the way women who work in this factory should behave." (Transcript, vol. V, pp. 133, 134). She felt that her rejection of his advances resulted in his making her working conditions difficult from October, 1978, onward, citicizing and yelling at her (Transcript, vol. V. p. 137).

She said that on June 11, 1979, she was fired because she had been sick for a week and Mr. DeFilippis claimed she had not phoned in while absent, but Mrs. Munoz said that her cousin had in fact phoned Mr. DeFilippis on her behalf, who reportedly had said to her cousin that her absence was excused if she brought a doctor's certificate. Mrs. Munoz said she showed the doctor's certificate (Exhibit # 28) to Mr. Long at the time of her firing, but he said it was up to the foreman and Mr. DeFilippis fired her. (Transcript, vol. V, pp. 128, 129). She testified he had previously told her he was going to fire her, and she felt this was because she had rejected his propositions (Transcript, vol. V, p. 145).

Mr. Jorge Valencia, Mrs. Munoz's cousin testified, confirming that he had called Mr. DeFilippis in June, 1979, to advise that she was ill and could not come to work, and that Mr. DeFilippis told him she could come back when she felt better. (Transcript, vol. VI, p. 48).

In his defence, Mr. DeFilippis denied Mrs. Munoz's allegations, and said that while she was a good worker her attendance record was spotty, suggesting that she was carrying on an affair with a male co-worker.

Roy Jover, age 25, testified. He immigrated to Canada from the Philippines in 1978 and went to work at the Pharmacy plant of Commodore, where he continues to be employed, now as a 'set-up' man. Mr. DeFilippis had been transferred to the Pharmacy Avenue plant in March, 1981.

Mr. Jover stated that at the Pharmacy Avenue plant Gina Kalousis complained to him about sexual advances by Mr. DeFilippis in 1982. He said she complained that Mr. DeFilippis was using dirty words with sexual connotations, had touched her, and Mr. Jover confirmed that Mrs. Kalousis was often crying on the job. He also confirmed that Mrs. Kalousis complained to him that Mr. DeFilippis would not give her work gloves, and that he, Mr. Jover, had been instructed by Mr. DeFilippis on an occasion not to help Mrs. Kalousis lift heavy machinery which he would ordinarily have done. Mr. Jover also stated that on one occasion she inferred Mr. DeFilippis had threatened her life. Mr. Jover felt that Mrs. Kalousis was frightened of Mr. DeFilippis because her sister, Dina Andrikopolous, had filed a complaint with the Human Rights Commission about Mr. DeFilippis. Mr. Jover impressed me as a truthful witness.

Rosa Morra testified, in part through an interpreter of Italian. She is 42, married, with two children. She has worked for Commodore for 17 years, the last ten at the Pharmacy plant.

She stated that when Mr. DeFilippis became her foreman in 1981 at the Pharmacy Avenue plant he commenced to make many lewd remarks to her, such as (in Italian) "Blessed is the thing that first streches and then shrinks." She said he would come close to her, and look at and comment upon her breasts. On one occasion when she had a toothache she says he said to her "if you let me put something in your mouth you will feel better." Mrs. Morra testified that when she continually rebuffed Mr. DeFilippis in his sexual advances he said, "You no make good girl for me, I no make good for you", and would be mean to her on the job. She said that when the 'set-up' man went on holidays Mr. DeFilippis made her do the heavy work every day, rather than rotate the

work amongst all the workers, in accordance with the usual procedure followed. Mrs. Morra testified that Mr. DeFilippis would occasionally, when she had to leave early for doctor appointments, give her credit on her time card for time not spent on the job, over her objections, trying to entice her with comments such as "look how nice I am - Why don't you be nice to me". Mrs. Morra stated that she, as well as Gena Kalousis and Dina Andrikopolous, were very nervous on the job, and feared Mr. DeFilippis. Mrs. Morra testified that she was called into a meeting with Enoch Braude, immediately following a meeting he had with Gena Kalousis, but that upon relating about Mr. DeFilippis' sexual advances to her and others, felt that Mr. Braude's look at her intimidated her such that she did not say anything more in this regard.

Mrs. Morra filed a Complaint dated April 8, 1983, although she said she first spoke with the Ontario Human Rights Commission in 1982. Mrs. Morra was a very emotional witness, often speaking quite rapidly. I found her to be a sincere, truthful witness.

The question arises, of course, as to why Mrs. Morra, and other women workers, did not go to management for help in dealing with Mr. DeFilippis. Mrs. Morra said that she did not have any confidence in Mary Barnett, one of the union representatives, who was often the 'go-between' between the workers and management. Mrs. Morra said that she was also embarrassed about the situation, and that she knew the more that someone complained about Mr. DeFilippis, the more he would spite the person.

Beatrice De La Cueva, married with two children, testified. She came from Ecuador in 1973 and worked at Commodore briefly in 1977. She said that Mr. DeFilippis asked her to go out with him some three times, and that on one occasion he showed her a pornographic drawing with a woman caressing a man's penis, and commented to her that "mine is better" (Transcript, Vol. VIII, p. 53). She felt that because of her rejections of Mr. DeFilippis that her section head, Enrique Plaza, was nasty to her, shouting at her and pushing her to work faster, and not letting her go to the washroom. (Transcript, Vol, VIII, p. 79). She finally quit with her husband confronting Mr. DeFilippis when she left. Mrs. De La Cueva is not a Complainant and became a witness through the investigation of the Human Rights Commission. A common accusation of the female worker witnesses at the hearing was that Mr. DeFilippis, once rejected in his sexual advances, would make life miserable for such women, both by his own words and actions, and also by imposing his will upon his male subordinates in positions of supervision over such workers to also make matters hard for them.

Melanthi Tsfantakis, who is married with three children, testified through a Greek interpreter (Transcript Vol. IX, pp. 81-163). She is an immigrant to Canada from Cyprus. She started work at Commodore's Pharmacy plant September 28, 1979, and has worked there ever since, apart from two or three 'lay-offs'. Mrs. Tsafantakis testified that when Mr. DeFilippis came to the Pharmacy plant in 1981 he began to use dirty words in Greek with her. These vulgar crudities are set forth in the transcript (Transcript, Vol. IX, p. 91), and need not be repeated. Mr. DeFilippis, in his defence, tried to explain away her perception of crudity by saying that she misunderstood his use of the word "money" for the Greek word for vagina. She says he also asked her to go out with him, and that she refused. In his defence, Mr. DeFilippis alleged that in fact, it was Mrs. Tsfantakis who had propositioned him asking him to come to her apartment when her husband was out of town. She was later laid-off but when called back to work persuant to the seniority system, she felt that Mr. DeFilippis was making it very difficult for her because of her rejection of his advances (Transcript, Vol. IX, pp. 93-99, 127, 137-141, 156). She said that she felt he hid her work gloves on one occasion. She eventually told her husband about her problems with Mr. DeFilippis, who confronted Mr. DeFilippis.

Mrs. Tsafantakis complained to Mary Barnett who took her to the Pharmacy Avenue Plant Manager, Enoch Braude, who (with her consent) taped their conversation. The tape was entered as Exhibit # 40. Mrs. Tsafantakis was a very impressive, truthful witness.

Mrs. Poonam Kapila testified (Transcript, Vol. VIII, pp. 91-113), in part in Hindi, through an interpreter. Mrs. Kapila is married with two children. She came to Canada from India in 1974, and started to work at Commodore's Warden Avenue plant in September, 1979, working until January or February, 1980. She said that a man in the plant (not Mr. DeFilippis and not clearly identified) made a sexual advance on both his own behalf and on behalf of Mr. DeFilippis. She felt that her rejection of this advance resulted in her then being given very onerous work. Her husband, Vijay Kapila, testified, confirming her story to some extent, and saying that although he protested about his wife's alleged mistreatment, they were unable to obtain any satisfaction.

Although Mr. and Mrs. Kapila's testimony was consistent with the testimony of other female workers, her complaint, at most, was really that a third party had abused her with his advances, and that management had then ignored her complaint and Mr. DeFilippis had punished her. However, there was no evidence that Mr. DeFilippis made any direct sexual advance to her and it was supposition on her part that he may have done so indirectly through a third party. She had never spoken to Mr. DeFilippis

about these matters. There was not nearly enough evidence in this hearing to establish that Mr. DeFilippis in any way sexually harassed Mrs. Kapila. The evidence of the Kapilas did not add anything one way or the other in dealing with the issues in this Inquiry.

Mrs. Gina Kalousis is married with three children. She emmigrated from Greece in 1965, starting work with Commodore at its Pharmacy Avenue plant in 1979. She said that in 1981 while she was working for another foreman Mr. DeFilippis approached her, told her he like her, and asked her "to go to bed" (Transcript, Vol. X, pp. 163, 164, 165). She said that he later became her foreman, would say dirty words to her in Greek and Italian, would brush her bottom saying in Greek "I like your ass" (Transcript, Vol. X, p. 165), and telling her he liked what was inside her jeans (Transcript, Vol. X, p. 166). On one occasion when the weather was bad and she accepted his offer of a ride home, she said he put his hand on her skirt and she had to get out. She testified that the next day he said to her that "Next time you come with me you have to give something" (Transcript, Vol. X, p. 168).

When she rebuffed him, she testified that he always tried to impress her with the power he had as a foreman to hire or fire, saying "I'm going to fuck you one way or the other" (Transcript, Vol. X, p. 171). He would suggest anal intercourse and fellatio to her (Transcript, Vol. X, p. 173). She said that during a lunch hour he indicated to her she should spread her legs (Transcript, Vol. X, p. 180). She testified that he told her he knew how to make people suffer, and that he caused her to cry several times by singling her out and criticizing her unfairly, hiding her gloves, and generally badgering her. On an occasion when she wanted to buy a cabinet from Commodore she testified that Mr. DeFilippis said to her, "You give me something,I give you that one." On another occasion when she left work early to go to the dentist, she said Mr. DeFilippis took her time card without her permission, offering "to fix it for you, give me something". (Transcript, Vol. X, p. 208).

She testified that while she was working on her machine that Mr. DeFilippis would push his body against hers. Mrs. Kalousis testified that her sister and co-worker, Dina Andrikopolous, and Melanthi Tsafantakis, complained to her at work about the advances they were encountering from Mr. DeFilippis as stated in their own testimony. Mrs. Kalousis impressed me as a truthful witness.

Mrs. Kalousis testified that Mary Barnett asked her to meet with Mr. Enoch Braude, following her sister's complaint, and that she told them about Mr. DeFilippis' advances, and gave the names of other female workers who had also complained

similarly. She testified that after the meeting, there were no more sexual advances by Mr. DeFilippis, but that he made her suffer through constant criticism of her work, and by being mean and unfair with her. She testified that he said to Roy Jover in her presence that he was "going to buy a gun to kill someone" at the plant (Transcript, Vol. X, pp. 196, 216). Mrs. Kalousis was sufficently frightened that she caused the police to be called.

Dina Andrikopolous, sister to Gena Kalousis, also worked at Commodore's Pharmacy Avenue plant. She is 34, married with three children, and came from Greece to Canada in 1965, starting with Commodore in 1979. When Mr. DeFilippis came to the plant and became her foreman, she said that Mr. DeFilippis on the first day he was there suggested, in crude language, anal intercourse, (Transcript, Vol. X, p. 17), and said he liked what she had "under" the long gold chain around her neck (Transcript, Vol. X. p. 18). She testified that when her husband went on a visit to Greece Mr. DeFilippis suggested that they go out and when she refused he called her a "Sunday lover". She testified that his response to her rejection of his advances was to say that "he will fix me or he will fuck me one way or the other" (Transcript, Vol. X, p. 25), and that if she reported him he would "get even" with her (Transcript, Vol. X, p. 28). She said he was always putting pressure on her and that she became very nervous and anxious. Mrs. Andrikopolous also testified that Mr. DeFilippis once credited her punch card with an extra fifteen minutes over her objection, saying to her "You see, I am good to you, so you have to be good to me" (Transcript, Vol. X, p. 29). She testified that he reacted to her rejection of his advances by "bugging" her, checking up on her while not bothering others, not allowing her to get work gloves, and telling the lead-hand not to help her, while laughing at her while she struggled with the heavy material (Transcript, Vol. X, pp. 39, 40). Pharmacy is unionized, and once at inventory taking time she was not called to help on an overtime basis by Mr. DeFilippis, although entitled on a seniority basis, and filed a grievance successfully. On one of the occasions when Mr. DeFilippis was criticizing her she broke down and cried (Transcript, Vol. X. pp. 47, 48). This resulted in her husband writing a letter to management the next day. She testified that she had not complained to management before this point in time because she feared Mr. DeFilippis and feared she would not be believed (Transcript, Vol. X, pp. 88, 89, 93, 94). Mrs. Andrikopolous confirmed some of Mrs. Melanthi Tsafantakis's testimony and her sister's testimony. Mrs. Andrikopolous also impressed me as a truthful witness.

Mrs. Andrikopolous said that she was fired in response to her husband's letter (Exhibit, # 42) although Commodore's view was that she simply could not take the

pressure of work (Exhibit, # 43). A union representative, Mr. Renford Armstrong, came to her house to prepare a grievance, and this resulted in a meeting with Enoch Braude, the Pharmacy Avenue plant manager. Mrs. Andrikopolous said that Mr. DeFilippis said at the meeting that her accusation of sexual harassment was a lie, and said Mr. Braude accused her of using the word "harass" because DeFilippis had been previously accused of harassment but Mr. DeFilippis "is not stupid to do the same thing again". However, Mr. Braude told her she could return to work provided she obtained a doctor's permission (Transcript, Vol. X, p. 53). She has been seeing a psychiatrist since. Throughout her testimony it was clear that Mrs. Andrikopolous was extremely nervous, anxious and upset because of her relationship with Mr. DeFilippis. There was much evidence about her problems in obtaining sick benefits, however, she did eventually receive some 26 weeks of benefits.

Her husband, Mr. Andre Andrikopolous, confirmed her testimony in so far as his knowledge went (Transcript, Vol. X, pp. 110-159), as did Renford Armstrong, the union representative, who is still employed at Commodore's Pharmacy Avenue plant. It was on Mr. Armstrong's initiative in going to her house that Mrs. Andrikopolous pursued a grievance, and he confirmed her version of what happened at the meeting with Enoch Braude. Mr. Armstrong testified (Transcript, Vol. XI, pp. 6-22) that Mr. Braude's view was that Mr. DeFilippis could not possibly be sexually harassing her as he would not be stupid enough to do that, given the six outstanding Complaints arising out of the Warden Avenue Plant against him, and Mr. Braude felt Mrs. Andrikopolous was simply not capable of working because she could not take the pressure from work. Moreover, Mr. Armstrong said Mr. Braude would not transfer Mrs. Andrikopolous to another department because then others would demand transfers, and Mr. Braude said he did not believe there was a problem with Mr. DeFilippis.

Alton Joseph Muise, a foreman for fifteen years with Commodore testified (Transcript, Vol. XI, pp. 58, 59) that on one occasion he found Dina Andrikopolous crying in the plant and that she told him Mr. DeFilippis was saying "dirty words" to her, and that she "couldn't take it any more". On another occasion, he found Gina Kalousis crying, who said Mr. DeFilippis was using "bad language" and was trying to take her out. He testified that both Mrs. Andrikopolous and Mrs. Kalousis were excellent workers. Mr. Meuse was a truthful, straightforward witness.

Mr. Ivan Jaramillo, an employee at Commodore's Warden Avenue plant since 1977 was present as interpreter at the meeting Mrs. Estrada had with Mr. Ed Kellow August 8, 1979. He said that Ms. Estrada claimed that Mr. DeFilippis had tried to kiss her in the back of the plant (Transcript, Vol. XI, p. 66).

Mrs. Cecilia Yanez, 38, married, with two children, started working with Commodore in June, 1981, at the Pharmacy Avenue plant. She testified that when she first worked for Mr. DeFilippis he was kind to her, but asked her out repeatedly, and to go to her place (Transcript, Vol. XI, pp. 94, 96). She said that as soon as he realized she was firm in her refusal of his advances, life became very difficult fo her. Mrs. Yanez said that Mr. DeFilippis would demand production of her, and criticize her work (Transcript, Vol. XI, pp. 97, 100). Mrs. Yanez felt she might lose her job, so successfully asked her former foreman for a transfer back to the night shift on the ruse that she wanted to take a course during the day time. She still works at Commodore.

Isadore DeCairos has worked at Commodore's Pharmacy Avenue plant since October, 1978. He confirmed that Melanthi Tsafantakis had complained to him about advances by Mr. DeFilippis, and being given a hard time by him upon being rebuffed (Transcript, Vol. XI, pp. 117, 119). He said that at the meeting to hear Dina Andrikopolous's grievance a union representative, Bob Nichol, asked that Mr. DeFilippis be fired, but Mr. Kellow said he was a good foreman and had no intention of firing him (Transcript, Vol. XI, p. 121).

Mr. DeCairos also confirmed that Gina Kalousis had complained to him about what she felt was a threat by Mr. DeFilippis "to shoot her" (Transcript, Vol. XI, p. 122). Mr. DeCairos impressed me as a truthful, straightforward witness.

Enrique Plaza, from Ecuador, called as witness by the Respondents, testified (Transcript, Vol. XV) through a Spanish interpreter that he started work at Commodore's Warden Avenue plant in 1973, and became a 'lead-hand' in 1976 in the packing department. Mr. DeFilippis was his supervisor. Mr. Plaza said that he had never seen Mr. DeFilippis touch or proposition a woman in a sexual manner. Mr. Plaza knew the six Complainants. He testified that he was told by Mrs. Vivanco at one point that "Mr. DeFilippis had asked her to go to the office to kiss her" (Transcript, Vol. XV, p. 36). Beyond that, he denied that he knew of any complaints of sexual harassment, and denied that he had made various statements about DeFilippis' conduct attributed to him by the previous witness, Mrs. Vivanco.

Mr. Plaza struck me as a conscientious worker, who kept to himself for the most part at Commodre. As he put it, the "reason I go to Commodore is to work, not to mind other peoples' business". He did not want to know anything about personal matters, and wanted to avoid trouble. He ate lunch by himself at his work station, after he became a lead-hand. He seems to be a shy, passive and reticent individual. The Commodore Warden Avenue factory impresses me as a noisy, busy workplace where there

is little personal contact between factory workers while working. Many people are coming and going, there is a lot of noise on the production line, with much equipment, materials and many machines located about the floor, and a good deal of activity going on. Mr. Plaza's evidence was not really helpful one way or the other. He did not know all that much by way of specific details as to what was going on between DeFilippis and some of the female workers. However, he certainly did have some sense of Mr. DeFilippis' harassment, even though he denied it.

Caesar Bravo testified, through the Spanish interpreter. He was an immigrant from Ecuador in 1972, working at Commodore in 1973 and 1974. He said that he once knocked at the door to Mr. DeFilippis' office, did not get a reply, and entered to find a female worker sitting on Mr. DeFilippis' lap. (Transcript, Vol. VIII, p. 30). More significantly, he testified that he would drive home after work with Mr. Plaza who would talk about Mr. DeFilippis' sexual interests in respect of female employees (Transcript, Vol. VIII, pp. 41-43). I accept Mr. Bravo's testimony in this regard. Mr. Bravo did not know any of the Complainants, and was an impartial witness.

Mr. Plaza did say that Mr. DeFilippis would criticize workers in Mr. Plaza's section from time to time and would ask Mr. Plaza to communicate such criticisms directly to the workers. Mr. Plaza admitted that he might, on occasion, when passing along such criticism mention its source to the worker. The female workers undoubtedly made their own inferences as to why Mr. DeFilippis was being critical of them. Thus, there are not such profound discrepancies between Mr. Plaza's evidence and that of the female workers, as might first appear. Mr. Plaza did not know about the specific details of Mr. DeFilippis' sexual harassment of female workers. In respect of the one suggestion he says he received, from Mrs. Vivanco, he laughed and went back to work. He did not want to get involved in other people's concerns. He is simply a factory worker, not part of management, who wants to keep to himself and get his job done. The Commodore Warden Avenue factory is non-unionized, with many unskilled immigrant workers of different backgrounds and language groups who do not speak English, and given the physical environment (a noisy, busy production line) it is not surprising that there is some lack of communication between workers, and between workers and management, and often confusion and misunderstanding in the communications that take place. I point this out not to be critical, but simply so as to describe the workplace as I understood it from the evidence given in the hearing.

Ray Bradbury, a manager at present with Commodore, testified and impressed me as a frank, truthful witness. He had hired Mr. DeFilippis as a 'shift

supervisor' at the Warden Avenue plant in 1973. Mr. Bradbury was then the "manager of manufacturing" (the position held by Mr. Long since 1977) and Mr. DeFilippis' immediate supervisor.

Mr. Bradbury testified that he personally never saw Mr. DeFilippis exhibit any unsatisfactory behaviour toward female workers but that in 1975 a woman worker who had been fired by Mr. DeFilippis appeared unannounced with her husband in Mr. Bradbury's office, claiming she had been asked out by Mr. DeFilippis, and fired unfairly. Mr. Bradbury called in Mr. DeFilippis who denied the accusations, and Joe Carreiro, the 'lead-hand' who worked with the lady, was then called in by Mr. Bradbury. Mr. Carreiro stated that he was the one who recommended to Mr. DeFilippis that the lady's employment be terminated. So far as Mr. Bradbury was concerned, that ended the matter, but he nevertheless told Mr. DeFilippis that the accusation, if it were true, was very serious, and would have led to serious consequences, including his dismissal. Mr. Bradbury also mentioned the matter to his own supervisor, Mr. Kellow, then the plant operations manager (now President and General Manager of Commodore).

Mr. Bradbury emphasized that Mr. DeFilippis has been a good, highly valued, worker for the corporation, who has achieved a high production level for his shift. He also testified that Mr. DeFilippis had told him he could speak Spanish and Greek.

Leslie Grunwald has worked at Commodore's Warden Avenue plant since 1976, during the period of time relevant to the complaints working in the punch press department, where he became the 'lead-hand' in the afternoon shift under Mr. DeFilippis as foreman. He testified (Transcript, Vol. XIV, pp. 4-12), that Mr. DeFilippis was a nervous individual who screamed at his employees, Mr. Grunwald included. Mr. Grunwald testified that he was the one, not Mr. DeFilippis, who generally assigned jobs within his department once a worker had been assigned by Mr. DeFilippis to the department. He said that he never saw Mr. DeFilippis do anything improper to the female workers. Moreover, he said he never received any complaints from female workers, including Mrs. Mejia, Mrs. Benel, Mrs. Estrada, Mrs. Biljak and Mrs. Munoz, about Mr. DeFilippis. He mildly criticized Estrada and Benel as workers, and said Biljak was lazy but that Mejia and Munoz were good workers. Mr. Grunwald denied that he had told either Mrs. Munoz, Mrs. Benel or Mrs. Mejia that Mr. DeFilippis had instructed him to make things difficult for the women (in contradiction to what each one had testified). He maintained that Mrs. Mejia's leaving the plant (whether fired or not) May 4, 1979, arose from criticism he, Mr. Grunwald, had made about her refusal to work on the machine Mr. Grunwald had

assigned to her. As Mrs. Benel, Mrs. Bejia and Mrs. Munoz all speak Spanish and limited English, and Mr. Grunwald speaks no Spanish and English in very low tones and with an accent, it is possible that to some extent he was misunderstood by them (given their existing impression that Mr. DeFilippis was making things hard for them).

Elpa Papakontantinoù testified (Transcript, Vol. XIV, pp. 124-142), under subpeona by the Respondents. She speaks Greek, with her English being limited, testifying through a Greek interpreter. She has worked at Commodore's Warden Avenue plant since 1978, working in the welding section under a Mr. Roseario as 'lead-hand' and Mr. DeFilippis as foreman. Her testimony was that she personally had never been propositioned sexually by Mr. DeFilippis, nor touched by him, and she did not see him do anything improper with anyone else. Vera Miceviski testified (Transcript, Vol. XIV, pp. 142-149) in Serbian through an interpreter to the same effect. She has been employed by Commodore at its Warden Avenue plant since 1978, and stated that she personally had never been bothered by Mr. DeFilippis. I do not doubt the truthfulness of Mrs. Papakontantinou and Mrs. Miceviski, as individuals, however, they spoke Greek and Serbian respectively while the Complainants spoke Spanish and there was no apparent contact between them.

Pritnam Singh Sian, a Sikh who speaks Punjabi and Hindi, as well as good English, worked at Commodore's Warden Avenue plant from 1974 to 1981 and was the 'lead hand' for Mr. DeFilippis in the brake press department from about 1977 to 1980. He has a strong personality and speaks forcefully and authoritatively. However, he was also like the 'lead hand' who had testified earlier, Mr. Enrique Plaza, in personality, in that he came to Commodore to work and was not desirous of forming personal friendships at the factory and knowing other peoples' business. Nothing concerned him unless it related to his own problems and self-interest. He always ate lunch by himself. Mr. Sian testified (Transcript, Vol. XVI, pp. 5-39) that he never saw Mr. DeFilippis do anything improper toward the female workers (Transcript, Vol. XVI, p. 12). If the Complainants, and the other female workers who testified for the Complainant, are telling the truth it seems very surprising, at least at first glance, that Mr. Sian would not have any knowledge of Mr. DeFilippis' sexual harassment.

Mr. Sian testified with respect to two particular points. First, he said (Transcript, Vol. XVI, pp. 8, 10) he knew quite well Poonam Kapila and her husband, and used to drive her home after work most days. Mr. Sian said that Mrs. Kapila had never complained to him about sexual advances by Mr. DeFilippis. I have discussed Mrs. Kapila's evidence supra, and as I have stated, her evidence in this hearing did not indicate any sexual harassment by Mr. DeFilippis. Mr. Sian's evidence on this point is consistent.

Second, Mr. Sian testified (Transcript, Vol XVI, pp. 22-29) that while Mrs. Benel had generally been a satisfactory worker, one evening her machine jammed twice, a most unusual circumstance, and he criticized her each time, the second time telling her he would report her to the foreman. The same night Mr. Sian said she refused to clean the machine at the end of the shift. Mrs. Benel said in her testimony that she may well have had such trouble with the machine because she was nervous due to her problems with Mr. DeFilippis, and went to see her lawyer the next day, June 13, to get a letter (Exhibit, # 61) asking the company to prevent Mr. DeFilippis from bothering her (Transcript, vol. V, p. 100). The next day, Mr. Sian said that shortly into the shift Mrs. Benel's machine again jammed and she sat down on a stool, smoking, and refusing to work. Mr. Sian testified that he told Mr. DeFilippis and Mr. Long that Mrs. Benel refused to work (Transcript, Vol. XVI, pp. 30-34).

Mrs. Benel's version of what happened was that she handed to the manager, Mr. Long, her letter (Exhibit, # 61) from her lawyer, which asked that Mr. DeFilippis not bother her, and that just after she gave Mr. Long the letter and left his office Mr. DeFilippis approached her immediately asking what she had done and that within a few minutes while at her machine, she was fired by DeFilippis who said "I don't like people like you who make problems." (Transcript, vol. V, pp. 110, 111). It is clear from Mr. Long's testimony that Mr. Sian came to him complaining about Ms. Benel within one-half an hour after Mr. Long had advised Mr. DeFilippis about the letter received from Ms. Benel (Transcript, Vol. XVI, pp. 190, 191).

While Mr. Sian was defensive and supportive of Mr. DeFilippis in testifying, and perhaps too stubborn in this regard, I think he was trying to be truthful. However, beyond the Kapila and Benel circumstances, he simply did not know much that was relevant one way or the other. As for the June 13 problem with Mrs. Benel, he simply did not know what was taking place between Mr. DeFilippis and Mrs. Benel. Her nervousness and fear of Mr. DeFilippis was making it difficult for her to operate her machine properly, and she was inferring that everything that happened to her adversely (being asked the previous evening to clean the machine) was due to Mr. DeFilippis getting back at, and being mean, to her. Mr. Sian did not know anything about the letter she had given Mr. Long a few minutes before she was fired. It is quite probable that she sat down on the stool after Mr. DeFilippis confronted her about the letter and said that because of the letter she was fired. It was impossible for her to work in the circumstances; she was not refusing to work. There was not any significant contradiction between the evidence of Ms. Benel and Mr. Sian when the totality of the evidence in the hearing was

considered. It defies belief to think that she would go to the expense and trouble of getting a lawyer to write a letter to her employer, seeking to protect her in her job, and then she would within minutes of delivering the letter simply refuse to work and thereby give her employer a good reason for firing her.

Joe Carreiro, an immigrant from Portugal, was the 'lead hand' in the brake press department of Commodore's Warden Avenue plant on the afternoon shift from 1973 to September 1978. He also testified that he personally never saw Mr. DeFilippis touch or verbally abuse any women at the factory (Transcript, Vol. XVI, pp. 129, 130). Moveover, Mr. Carreiro suggested that the lady who went to Mr. Bradbury in 1975 to complain about sexual harassment by Mr. DeFilippis, had been criticized to Mr. DeFilippis by Mr. Carreiro for leaving too much 'garbage' around the machines, which Mr. Carreiro told Mr. Bradbury after he was called into Mr. Bradbury's office subsequent to the lady's dismissal (Transcript, Vol. XVI, pp. 132-134). Whether his accusation about the lady was in fact true or not, so far as Mr. Bradbury was concerned it was certainly a plausible reason for his thinking the lady was not being truthful in saying that DeFilippis harassed her. Mr. Carreiro's credibility was challenged when on cross-examination, he admitted that three female workers had complained about sexual harassment by him. He denied ever harassing anyone, but was somewhat nervous and evasive when he was testifying.

Mr. Vince Long has been with Commodore for some ten years at its Warden Avenue plant and at the times relevant to the six Complaints was plant manager, reporting only to Mr. Kellow, the President and General Manager of Commodore.

Mr. Long testified (Transcript, Vol. XVI, pp. 171-172) that Mr. DeFilippis was an excellent foreman who was reliable, conscious of quality control, and who maintained his level of production as high or higher than the first shift. Mr. Long said that he himself had never seen or heard Mr. DeFilippis proposition a woman worker.

With respect to Complainant Mejia, Mr. Long testified that at the meeting of May 4, 1979 with Mrs. Mejia, she complained only about work harassment and not sexual harassment (Transcript, Vol. XVI, p. 175). At this meeting, only about one-third to one-half the conversation was in English, the other portion being in Spanish, translated by Mrs. Mejia's young daughter for her mother, and in the latter part of the meeting tempers were flaring, Mrs. Mejia was very excited, speaking loudly to Mr. DeFilippis in Spanish. Mr. Long testified that she did say to him as she left the meeting that "your eyes will be opened." There probably was a good deal of confusion as to what was actually said at this meeting.

With respect to Complainant Munoz, Mr. Long testified (Transcript, Vol. XVI, pp. 180-184) he had authorized Mr. DeFilippis to terminate her employment because she had been absent for a week without notifying Commodore. Commodore's policy is that if three days go by without an employee calling in, termination usually will be made. Mr. Long said that when Mrs. Munoz returned to work, and learned she had been terminated, she told Mr. Long that her cousin had called Mr. DeFilippis about her absence. Mr. DeFilippis denied to Mr. Long that he had received any such call, and as Mr. Long accepted his foreman's word her termination was not reversed.

With respect to Complainant Benel, Mr. Long testified (Transcript, Vol. XVI, pp. 184-186) that he had received a telephone call from Mrs. Benel's brother saying that Mr. DeFilippis was picking on her, and in subsequently observing her the next day, thought she was not doing very well with the machine she was working on and transferred her to another department. Mr. Long was saying, in effect, that he already did not consider her to be a good worker when on June 13, 1979, he received a delivered letter (Exhibit # 61) about 4:00 p.m. from a lawyer accusing Mr. DeFilippis of harassment.

About 4:30 p.m. that day, Mr. Sian, 'lead-hand' in Mrs. Benel's department, came to Mr. Long saying that Mrs. Benel had refused to work. Mr. Long said he called Mr. Kellow, the President, who advised him to do what he thought fit. Mr. Long says he assumed the letter referred to alleged work harassment rather than sexual harassment (although reference was made in the letter to the Ontario Human Rights Commission). Thinking there were valid reasons for terminating her employment, Mr. Long fired Mrs. Benel (Transcript, Vol. XVI, p. 188).

With respect to Complainant Estrada, following receipt August 8, 1979, by Commodore of notification of her making a complaint to the Human Rights Commission, she was called to a meeting the very same day, with Mr. Long and Mr. Kellow. Mr. Long said that when asked what Mr. DeFilippis had done she said only that he had "touched her on the cheek and said that she had had a pretty dress on" (Transcript, Vol. XVI, p. 198). Mr. Long denied she had said much more, (Transcript, Vol. XVI, p. 200) and that Mr. DeFilippis later admitted to this improper conduct and was chastized by Mr. Long. Their conversation with Mrs. Estrada was through a Spanish interpreter, Mr. Jaramillo.

Mr. Long, and Commodore's senior management generally, were strong believers in Mr. DeFilippis. Mr. Long described Mr. DeFilippis as very reliable, always on the job, very conscientious, and a strong-minded man who organized the plant operations well. He viewed Mr. DeFilippis as an excellent foreman.

Mr. Long emphasized that it was August 8, 1979, with the meeting called by himself and Mr. Kellow to hear about Mrs. Estrada's Complaint, that he first heard about the allegations of sexual harassment. This was an important meeting because management then knew that there were six Complaints, Mr. Kellow having received a telephone call that morning from Ms. Fern Gaspar, the Human Rights Officer investigating, advising him of the six Complainants, and Mrs. Estrada was the only Complainant who was still an employee. Although Mrs. Estrada, and Ivan Jaramillo, the interpreter at the meeting, testified that Mrs. Estrada related a considerable part of the quite detailed harassment set forth in her Complaint (Exhibit, # 10A), Mr. Long testified she only related one incident of Mr. DeFilippis touching her cheek and telling her she had a pretty dress. Mr. Kellow stated essentially the same thing in giving his evidence. In essence, they were saying that was the only specific accusation management had August 8, 1979, from Mrs. Estrada, and Mr. Kellow did not yet have the written Complaints. Even if one allows for honest confusion arising from a situation of a Spanish speaking female worker speaking through an interpreter about sexual harassment to the president and plant manager of the corporation, what cannot be explained easily is why Messrs. Kellow and Long did not pursue with Mrs. Estrada her complaints more vigorously and learn about the very serious detailed accusations contained in her Complaint (Exhibit, # 10A). Ms. Gaspar, the investigating Human Rights Officer, testified that she had given general descriptions of the Complaints in the morning telephone conversation with Mr. Kellow.

Following the meeting with Mrs. Estrada, Mr. Long confronted Mr. DeFilippis with the single accusation that Mr. Long says he had received verbally at that point from Mrs. Estrada, that DeFilippis had touched her cheek and said she had a pretty dress on an occasion, and DeFilippis admitted to this single indiscretion and was reprimanded.

Following the August 8, 1979, meeting and the reprimand of Mr. DeFilippis there was no internal investigation by Commodore's management to determine as best it could whether Mr. DeFilippis was being truthful or not. Mr. Long did speak with each of his foremen separately, warning them in a general way that sexual harassment was not proper. In essence, Mr. Long and Mr. Kellow trusted Mr. DeFilippis and were prepared to take his word at face value.

Flor Aguilar, orginally from Ecuador, testified through a Spanish interpreter. She worked at Commodore's Warden Avenue plant, mainly in the punch and brake press department, from 1975 to 1978.

Ms. Aguilar testified (Transcript, Vol. XVII, pp. 132, 133) that she personally was not ever bothered by her foreman, Mr. DeFilippis, in terms of sexual harassment. He would drive her home on occasion. Moreover, she had not witnessed sexual harassment of any other female worker. She did say that some of the male workers (not any of the 'lead-hands') would often jokingly say at lunchtime that Mr. DeFilippis is "a man who liked to bother girls" (Transcript, Vol. XVII, p. 135) but the female workers took this as being a jest.

Ms. Aguilar testified that she was moved by her lead hand from spot welding to a machine, and shortly thereafter was treated very rudely by Mr. DeFilippis who told her to go back to spot welding. She refused and went to his office arguing strenuously that she should not go back to welding because of eye problems and she said her doctor's letter supporting her contention. As Mr. DeFilippis would not agree, and insisted on her going to welding, she quit and as a consequence of her giving up her job, lost her home. A person in her position might have considerable bitterness toward a supervisor like Mr. DeFilippis given the problems he had created for her. Clearly, she was being truthful in testifying that she personally had no knowledge of any sexual harassment in respect of Mr. DeFilippis.

Wilford Kaye, who is a union representative at Commodore's Pharmacy Avenue plant, has worked in the sheet metal department since before Mr. DeFilippis' arrival at that plant in 1980. He testified (Transcript, Vol. XVII, pp. 165, 166) that he personally was not aware of any sexual harassment on the part of Mr. DeFilippis and I found him to be truthful in so testifying.

Cleotilde Arias, from Colombia, has worked at Commodore's Warden Avenue plant since 1978, with Mr. DeFilippis as her foreman until he left for the Pharmacy Avenue plant in 1981. She testified that she became good friends with Mr. DeFilippis, and that as a result the Complainants and other women in the plant stopped talking to her, accused her of telling him tales about them, and claimed that Mr. DeFilippis had changed in his treatment of them since his arrival. There was a great deal of gossip, pettiness and suspicion between many women in the plant. It was clear from Ms. Arias' testimony that the Complainants, whom she said came from small villages in Colombia, did not approve of her being Mr. DeFilippis' mistress. Her testimony was really not directly pertinent to the main issue in the hearing. However, the fact of her own intimate friendship with Mr. DeFilippis throughout most of the period of the alleged sexual harassment by Mr. DeFilippis of the six Complainants raised an implied question as to why he would then make the alleged very crass advances toward the

Complainants. Ms. Arias is an attractive person who seems to have been genuinely attracted to Mr. DeFilippis. She is no longer Mr. DeFilippis' girlfriend, and had no apparent reason to try to protect him through her testimony. However, she was very protective of him and some of her testimony seemed rather incredible. Given the testimony of the other dozen or so women who claimed Mr. DeFilippis asked them out often virtually from their first day of work, it hardly seems plausible that he first asked Ms. Arias out "after three or four months", as she and he both testified. She said that it was only after "he saw me so many times standing there waiting for my bus" that Mr. DeFilippis offered her a ride part of the way home. (Transcript, Vol. XVIII, p. 9).

Mrs. Mary Barnett, age 55, has been an employee of Commodore for some twenty-four years, being at the Pharmacy Avenue plant at the times material to this hearing. Mrs. Barnett said that she never saw any improper conduct by Mr. DeFilippis toward female employees. As a union representative, she was present at Mr. Braude's request at meetings he had October 10, 1982, with women workers for the purpose of investigating sexual harassment accusations against Mr. DeFilippis that Mr. Braude had then received from Melanthe Tsafantakis and Dina Andrikopolous. Mrs. Barnett is a quiet, passive person who obviously minds her own business. She was being truthful in her testimony, but she did not know much that was pertinent to the issues. She was the instrumental force in securing a transfer of departments for Mrs. Tsafantakis at the meeting that lady had with Mr. Braude, as was clear from the tape recording (Exhibit, # 40) of the meeting. (Transcript, Vol. XVIII, pp. 152 - 155).

Enoch Braude became the plant manager of the Pharmacy Avenue plant in June, 1981, taking over from Mr. Bradbury. Mr. Braude was an immigrant to Canada from Israel in 1966.

Mr. Braude emphasized that Mr. DeFilippis, who was already at the Pharmacy Avenue plant as a foreman when Mr. Braude began to work there, was an excellent foreman.

He called a meeting with Mrs. Tsafantakis in March, 1982 at her request. It is clear that at this meeting Mrs. Tsafantakis accused Mr. DeFilippis of sexual harassment. On the tape recording (Exhibit, # 40) she said "If you sleep with Guy you are the best, if you don't you are garbage". Mr. Braude said he concluded that Mr. DeFilippis did not sexually harass Mrs. Tsafantakis, largely on the basis of Mr. DeFilippis' denial.

Mrs. Tsafantakis testified in the hearing as I have set forth (supra pages 39, 40). I find it hard to believe anyone could conclude that her accusations against Mr.

DeFilippis would not be believed by an impartial observer. She impressed me as a sincere, truthful person. She has never laid a formal complaint and would not gain materially from testifying against Mr. DeFilippis. Mr. Braude knew she had a good work record and was no trouble. The only thing she wanted in the meeting with Mr. Braude was a transfer, and she said she would take less pay and heavier work on any other shift. In fact, at the end of the meeting she was transferred to the night shift at slightly less pay. At the meeting Mrs. Tsafantakis had said she would go to the Ontario Human Rights Commission with her problem unless she was transferred away from Mr. DeFilippis, but with a transfer would "forget the matter". She was desperate to get away from DeFilippis. It is true that Mr. Braude only had accusations, and not objective proof, of Mr. DeFilippis' sexual harassment at the point in time of this meeting, as he emphasized in his testimony. However, an objective manager would have had very grave suspicions of Mr. DeFilippis at the point in time of this meeting, particularly given the six outstanding Complaints from the Warden Avenue plant. It is true, as Mr. Braude had said, that it seemed incredible to imagine that a man already accused by six Complainants of sexual harassment might engage subsequently in sexual harassment of female workers, nevertheless, given the later accusations of Mrs. Tsfantakis (followed later by those of Dina Andrikopolous, Gina Kalousis, and Rosa Morra), any manager, taking into account the six earlier Complaints, would have to be very suspicious about Mr. DeFilippis. All four of these women, Mrs. Tsfantakis, Mrs. Andrikopolous, Mrs. Kalousis and Mrs. Morra, are very impressive and convincing witnesses. They relate their relationships with Mr. DeFilippis with such a degree of emotion and feeling that it should be obvious to the impartial observer that they are telling the truth. However, Mr. Braude was prepared to accept Mr. DeFilippis' word of denial. Mr. Braude testified (Transcript, Vol. XIX, pp. 123, 124) that he concluded he did not believe Mrs. Tsfantakis' claim of sexual harassment, thinking that she just "couldn't get along with her foreman". Mr. Braude did not speak with any other female employee at the time of Mrs. Tsfantakis coming to him.

At a grievance meeting September 10, 1982, Mr. Braude heard a grievance of Mrs. Dina Andrikopolous, and heard her make accusations of sexual harassment by Mr. DeFilippis. This grievance meeting emanated from her termination following a letter (Exhibit, # 42) by her husband claiming simply "harassment" against his wife. Mr. Braude thought her grievance "looked fishy" because she seemed to him to be either malingering or just could not take the pressure of day-to-day criticism by a foreman. However, Mr. Braude did then check into the specific accusations contained in Mr. Andrikopolous' letter.

Mr. Braude rationalized his asserted conclusion that Mrs. Andrikopolous was not telling the truth in alleging sexual harassment at the grievance meeting because her written grievance (Exhibit, # 49) and her husband's initial complaining letter only specified general "harassment" and did not use the prefacing word "sexual". However, the documents seemed, at the least, to imply sexual harassment, and the union representative, Mr. Armstrong, who wrote up the grievance, and who was present at the grievance meeting had heard the accusations of sexual harassment when he went to Mrs. Andrikopolous' house to write up her grievance but thought it best to simply refer to general "harassment" in the written form at that stage.

Robert Nichol, an experienced representative of the United Steelworkers of America Union, attended the third stage grievance hearing in respect of Dina Andrikopolous's allegations against Mr. DeFilippis at the Pharmacy Avenue plant. He confirmed her testimony as to the detailed instances of sexual harassment that she related at the grievance hearing. (Transcript, Vol. XXVII, pp. 121 - 124). Mr. Nichol did not know anything at that point in time about the allegations by the six Complainants who had worked at the Warden Avenue plant.

Most important, Mrs. Andrikopolous impressed me as a truthful witness and I think it was obvious from the emotion, anxiety and nervousness she expresses in telling her story, that someone in the position of Mr. Braude should conclude that the woman is being truthful. Instead, Mr. Braude again accepted Mr. DeFilippis' flat denial and claim of conspiracy against him.

However, Mr. Braude did decide to investigate at this point and about a month later, October 10, interviewed women who worked in the vicinity of Dina Andrikopolous. Mr. Braude made notes (Exhibit, # 54) of these interviews. The interviews determined that Elsie Smith and Clara Cernjakovic, women said to be about fifty years of age, told Mr. Braude they did not know of any problems with Mr. DeFilippis. Another woman, Lupe Ormaza, said through a translator that she had no problems.

However, both Gina Kalousis and Rosa Morra said in their separate interviews with Mr. Braude that they had experienced sexual advances by Mr. DeFilippis. However, Mr. Braude said he did not believe them, apparently because Gina was Dina's sister, and her lead hand dismissed her accusation as "crazy", and because Mr. Braude had some notion from Mrs. Barnett (not remembered by Mrs. Barnett in her testimony) that Mrs. Morra had retracted her accusation shortly after the meeting. However, Mr. Braude did investigate the possible accusation by another woman, Karen

McEwen, which he had learned about in speaking with another foreman about the Kalousis accusation, and determined that Mrs. McEwen denied making any accusation. Thus, Mr. Braude was investigating the accusations of his female workers. There was a possible basis for his being suspicious that the women's accusations were unfounded, however, I think it was a serious error in judgment for a manager who had heard these ladies' complaints to accept Mr. DeFilippis' denial and implicitly decide that they were lying in making their accusations. The simple fact is that all four women, Mrs. Tsafantakis, Mrs. Andrikopolous, Mrs. Kalousis, and Mrs. Morra are very impressive ladies, and I think, quite obvious in their sincerity to be truthful. Senior management, in the absence of objective proof, was always prepared to give the benefit of the doubt to Mr. DeFilippis, no matter how suspicious they were, or should have been.

Mr. DeFilippis testified that when Mr. Kellow directly confronted him one on one with the six Complaints, that Mr. Kellow said he wanted the truth from Mr. DeFilippis, but that the corporation would pay if the accusations were true and Mr. DeFilippis could retain his position, although he would be severely reprimanded. Mr. DeFilippis maintained to Mr. Kellow that the accusations were entirely false, indeed, that there was a conspiracy against him and he wanted to defend himself and the corporation, as he was not going to admit to something he did not do. The corporation has accepted his word and obviously stood behind him throughout these proceedings. Morever, in 1981, well after the Complaints of 1979 were outstanding against him, Mr. DeFilippis sought and obtained a job with another corporation and gave notice to Commodore, but Mr. Kellow requested that he remain with Commodore, and met his request of giving him a day shift, by transferring him to the Pharmacy Avenue plant and promoting him.

Mr. Edward C. Kellow, President and General Manager of Commodore, testified that Vince Long (plant manager for the Warden Avenue plant) telephoned him June 13, 1979, about the letter (Exhibit, # 61) delivered by lawyer Ms. Judith McCormack on behalf of Ms. Benel that day, claiming harassment of her. Mr. Kellow advised Mr. Long to deal with Ms. Benel on the merits, and she was fired by Mr. DeFilippis.

Mr. Kellow had a telephone conversation with Ms. McCormack after receiving her letter in which he was very forceful with her, but denied she mentioned "sexual" harassment. Ms. McCormack was certain that "sexual" harassment was mentioned by her in this conversation. As Ms. McCormack had already referred her clients to the Ontario Human Rights Commission the previous week, quite clearly Ms. McCormack knew on June 13 that her clients were alleging "sexual" harassment. I think

both Mr. Kellow and Ms. McCormack honestly believe in their own version of this telephone conversation. Whether or not "sexual" harassment was mentioned at that point in time is not material to the issues. However, Ms. McCormack's second letter (Exhibit, # 93) to Commodore, dated June 25, 1979, would reinforce any mistaken inference in respect of her first letter, that it was simply work harassment rather than sexual harassment that was at issue.

Mr. Kellow testified that the first occasion he heard about allegations of "sexual" harassment was on August 8, 1979, when Ms. Fern Gaspar, a Human Rights Officer with the Ontario Human Rights Commission, telephoned him in the morning to say that six complaints had been made which she was investigating. He said he promised full co-operation by Commodore to Ms. Gaspar, and she confirmed in her later testimony that she had received this co-operation. Mr. Kellow acted quickly upon receiving Ms. Gaspar's telephone call, calling Mr. Long and arranging to meet Mrs. Estrada (the only one of the Complainants still employed with Commodore) with an interpreter as soon as her shift began at 4:00 p.m.

There was disagreement as to what was said at this meeting, Mr. Kellow, Mr. Long and Mr. DeFilippis alleging that Mrs. Estrada only complained that Mr. DeFilippis had "touched her hair and said that she had a pretty dress" which Mr. DeFilippis admitted to after he was called in, while Mrs. Estrada and Ivan Jaramillo (the interpreter at the meeting) testified that Mrs. Estrada had elaborated a great deal more about Mr. DeFilippis' alleged sexual harassment. Mr. Kellow denied that Mrs. Estrada had raised at the meeting the allegations contained in paragraphs 6, 7, 8, 10, 11 and 13 of her affidavit (Exhibit,#23) made to Ms. McCormack. Mrs. Estrada was crying at the meeting and was undoubtedly nervous throughout. Moreover, as both her allegations and management's queries were being translated from Spanish to English, there was considerable room for misinterpretation and confusion as to what she was saying. (Transcript, Vol. XXV, pp. 212, 213).

Mr. Kellow did not have the written complaints at this point in time, which he received about August 15, 1979 (Exhibit, # 94). However, he knew from Ms. Gaspar's telephone call that there were six complaints alleging sexual harassment by Mr. DeFilippis.

> THE CHAIRMAN: What I would like to ask is this, Mr. Kellow: You had this meeting with Estrada August 8th.

THE WITNESS: Mm hm.

THE CHAIRMAN: You thought it was dealt with. You told her, you say you told her that she can come to management if there are any further problems.

THE WITNESS: Yes.

THE CHAIRMAN: August 13th, Fern Gaspar wrote her letter to you with the six formal written complaints.

THE WITNESS: Yes.

THE CHAIRMAN: So let's assume that you would have received them on August 15th or 16th.

THE WITNESS: Right.

THE CHAIRMAN: Now, Estrada was still an employee of Commodore up to October 5ht, '79. I guess what I am wondering at this point is, taking everything that you have said, including your statement, that you didn't think it was proper that just you deal with the complaints at this point. It was the Human Rights Commission that was investigating, but it was a sort of joint effort. You wanted to get to the truth, too.

THE WITNESS: Right.

THE CHAIRMAN: Just taking that at face value, why wouldn't you, over that period August 15th through to October 5th, get Estrada in again, say with Fern Gaspar, and sit down with a translator, spend some time and go through her written complaint in detail.

I mean, you had the written complaint. Now It had a lot of allegations that were horrible allegations. There were a lot more than you thought she said at the August 8th meeting. I just ... I find it hard to imagine that, over that period of time, somebody wouldn't say: "Hey, Estrada is still here. We can talk to her. Let's sit down with Fern Gaspar and make our own assessment of what's going on here."

THE WITNESS: I guess in retrospect, it probably would have been better to have done that, but I can't help believing that when it is under investigation, it is best left to the people that are perhaps more experienced in handling it. This was my thinking, whether I was right or whether I was wrong. I was quite willing, I think we demonstrated it, to totally assist the Human Rights in every direction. I thought that that is what we should do. I still think that is what we should do. (Transcript, Vol. XXV, pp. 178 - 180.)

Mr. Kellow said that after the first meeting with Ms. Gaspar, August 28, 1979, that he thought it unnecessary and improper for Commodore to do its own investigation, but rather its role should be to co-operate with Ms. Gaspar in her investigation. (Transcript, Vol. XXV, pp. 174, 178, 179) Ms. Gaspar said that at the August 28 meeting with Mr. Kellow he expressed being puzzled by the fact that six Complainants alleged sexual harassment over a long period of time without complaining to management. Ms. Gaspar thought Mr. Kellow was of the view that their might be a conspiracy against Mr. DeFilippis.

Mr. Kellow testified that following this meeting he cautioned Mr. DeFilippis about improper behaviour (Transcript, Vol. XXV, p. 172). Some time later, after the Ontario Human Rights Commission had investigated and was seeking a settlement with Commodore, he met alone with Mr. DeFilippis, telling Mr. DeFilippis that he would be reprimanded but not fired if he admitted that the allegations were true, but it was imperative to be truthful with Commodore (Transcript, Vol. XXV, pp. 183-185). Mr. DeFilippis' response was that he could not admit to something he did not do. Mr. DeFilippis has continued to maintain his denial of the allegations in the complaints, and Commodore has accepted his word and supported him in his defence of the complaints. Commodore did not take any initiative in investigating the six Complaints apart from the August 8, 1979, interview of Mrs. Estrada, because Mr. Kellow believed Mr. DeFilippis in his denial of any wrong doing, because Mr. Kellow was suspicious of the circumstances as he saw them surrounding the six Complaints which led him to believe there possibly might be a conspiracy against Mr. DeFilippis, and because he thought it proper for the Ontario Human Rights Commission to conduct the investigation, with Commodore's full cooperation. I do not doubt Mr. Kellow's sincerity in this belief and approach to the problem.

However, it was unfortunate that during the investigation stage of the six complaints that management never sat down with Ms. Gaspar and the six Complainants personally to review their allegations directly with them face to face, and then make an assessment.

After hearing a great deal of evidence it seems the chronology of events is clear. After being fired by Mr. DeFilippis May 4, 1979, Mrs. Mejia went to the "Working Women's Centre" on May 8, 1979, about her problems with Mr. DeFilippis, which organization referred her to Mr. Pepe Altikes, an immigrant to Canada who had been a lawyer in Chile. He referred Mrs. Mejia to the Ontario Human Rights Commission, and

her Complaint (Exhibit, # 8A) was signed May 14, 1979. Mrs. Biljak, Mrs. Munoz, Mrs. Olarte, Ms. Benel, and Mrs. Estrada all went to Ms. McCormack for help at a later point in time, who referred them to the Human Rights Commission June 7, 1979. Mrs. Munoz was fired June 11, Ms. Benel was fired June 13, Mrs. Biljak left due to sickness June 13, and Mrs. Estrada quit October 8, 1979.

When Mr. DeFilippis was on the stand, letters of reference from previous employers were introduced as Exhibits # 77 and # 78 during his examination-in-chief, including a very flattering one dated March 18, 1971 (Exhibit # 77) by Frank B. Knight, President of Teledyne Still-Man Mfg. (Canada) Ltd. (hereafter "Teledyne").

At the very beginning of the cross-examination of Mr. DeFilippis, he was asked about his Teledyne employment record and why he had been transferred by the President of Teledyne, Frank Knight, from Teledyne's Toronto plant to its New York plant, and then left Teledyne's employment. Mr. DeFilippis asserted in response to these questions that his transfer was in the nature of a promotion and denied categorically that it had anything to do with problems and complaints in respect of female employees in the Toronto plant. (Transcript, Vol. XXII, pp. 11-13). He then denied further the suggestion put to him in cross-examination that in New York he had been discovered by a man in an embarrassing situation with the man's wife, who worked for Mr. DeFilippis, and denied that he had been fired for this reason. (Transcript, Vol. XXII, pp. 14-18). He repudiated the suggestion of impropriety in part by relying upon the quite flattering letter of reference (Exhibit # 79) he had received from Mr. Knight, saying:

> A. No.
>
> Q. And you were fired, immediately?
>
> A. I'm not fired. I got a letter of reference here.
>
> Q. Oh, I know you got the letter.
>
> A. Why they don't write that, then?
>
> ...
>
> Q. And you had to get back into Canada after you left New York, didn't you?
>
> A. Yes.
>
> Q. Yes ... so you would need a letter such as the letter from Frank Knight, wouldn't you?

A. He give it to me.

Q. Especially after an incident, if such an incident happened.

A. The letter speak for itself. It's right there.

(Transcript, Vol. XXII, pp. 14, 18-19).

At the end of the day's hearing, I asked some questions of Mr. DeFilippis,

THE CHAIRMAN: Mr. DeFilippis, just before we leave for the day, I wanted to ask you about some of the questions Ms. Smith asked you this morning, because I think those questions, perhaps, took you by surprise, and I am not entirely sure what you said.

...

THE CHAIRMAN: In Toronto?

She said that you had been caught having sexual intercourse in the plant, and that you had been transferred to New York.

She suggested that that was the reason for the transfer.

THE WITNESS: Yes...yes, okay.

THE CHAIRMAN: And you denied that.

THE WITNESS: M'hm.

MS SMITH: It wasn't that one incident that was the reason.

THE CHAIRMAN: Just let me finish.

And she suggested that, when you were in New York, that you had a problem in that she suggested a husband had walked in upon you and the husband's wife, who was a worker, having sexual intercourse, and they fired you for that reason.

THE WITNESS: They don't fire me.

THE CHAIRMAN: Well, just ... I know. I just wanted to get, to understand what your answers were this morning.

You deny that?

THE WITNESS: Of course.

THE CHAIRMAN: Now, you understand that the issue in this Inquiry is the question of harassment of the six complainants?

THE WITNESS: Yes.

THE CHAIRMAN: And we are not interested in your previous life, and your personal behaviour, and your own sense of morality, in that sense.

You understand that?

THE WITNESS: Yes.

THE CHAIRMAN: But of course, what is important to the question of harassment here, is the question of credibility. You understand that?

THE WITNESS: Yes.

THE CHAIRMAN: Whether you are telling the truth, or the complainants are telling the truth?

THE WITNESS: Yes.

MS RUSAK: Mr. Chairman, could all this be said in Italian, because I see a quizzical look on Mr. DeFilippis' face.

THE CHAIRMAN: Now, the reason you are being asked those questions this morning, Mr. DeFilippis, was to, I assume, to test your credibility.

You understand that?

THE INTERPRETER: Yes.

THE CHAIRMAN: You deny that those things happened in your previous employment?

THE INTERPRETER: No company ever fire me.

THE CHAIRMAN: And you deny those suggestions she made about what had happened in the previous employment? I don't want to go through them again.

MS SMITH: I also want to point out that he also reads, in-chief, that he had never had any prior similar problems at any other place of employment. He raised it.

THE CHAIRMAN: He did. I just want to be sure what you are denying.

Are you also denying that anyone at Teledyne Stillman ever accused you of doing that, whether you did it or not...that you were accused of doing it?

THE INTERPRETER: Accused, yes. Not that they saw me do anything, we were horsing around.

THE CHAIRMAN: Well, just so I am clear: Are you saying "yes" or "no", you were accused at Teledyne Stillman of having sexual intercourse with a worker in the plant?

THE INTERPRETER: No, he was not accused.

THE CHAIRMAN: I am not talking about the accusation Ms. Smith had in her question today. I am saying, I am asking whether your former employer ever accused you of that?

THE INTERPRETER: To horse around a bit, yes. That was 20 years ago. I was a young kid.

THE CHAIRMAN: Well, what do you mean, "horse around a bit"?

THE INTERPRETER: Well, touching in a playful manner, horsing around, is probably the best translation I can think of.

THE CHAIRMAN: And is that why they, Teledyne Stillman, said they were transferring you to New York?

THE INTERPRETER: No.

THE CHAIRMAN: Were you accused, in New York, of having sexual intercourse with a worker?

THE INTERPRETER: No. No, not fellow workers. I mean, I did have things going on with other people, but not fellow workers.

THE CHAIRMAN: So you were, or you were not accused, by Teledyne Stillman, of sexual activity with workers in the New York plant?

THE INTERPRETER: With plant workers, no.

THE CHAIRMAN: Well, with anybody connected with the company?

THE INTERPRETER: What firm are you talking about, now?

THE CHAIRMAN: I was talking about Teledyne Sillman.

THE INTERPRETER: I was sent there because I was a young man. I had a promising future. I could get more money.

THE CHAIRMAN: So you are saying that, in response to those questions you were asked this morning, you are denying everything, except that you say you were accused, while you were at Teledyne Stillman, of horsing around?

THE INTERPRETER: Horsing around, yes.

THE CHAIRMAN: In the Toronto plant?

THE INTERPRETER: Yes.

THE CHAIRMAN: But you are also saying and denying that that had anything to do with your transfer, or your ultimate firing from Teledyne?

THE INTERPRETER: Correct.

(Transcript, Vol. XXII, pp. 256-261).

At the commencement of proceedings the next morning (July 23, 1983) following the above testimony, on his own initiative Mr. DeFilippis admitted to a lie in his testimony the previous day saying that in fact he was called to a meeting by the President and union officers at the New York plant because a man had complained about Mr. DeFilippis taking out the man's wife who worked for Mr. DeFilippis. (Transcript, Vol. XXIII, pp. 4-12). Mr. DeFilippis said he mistakenly thought the woman was single, but admitted under cross-examination to having intercourse with her. However, Mr. DeFilippis insisted he was not fired by Teledyne due to this problem. (Transcript, Vol. XXIII, p. 8). He also continued to deny that he had been accused of sexual involvement with female workers at Teledyne's Toronto plant, and denied that he was transferred because of such accusations (Transcript, Vol. XXIII, pp. 12-20).

As Reply evidence, Margaret Trytten and Gertrude McMullen, who had worked at Teledyne when Mr. DeFilippis was foreman there until 1971, testified that Mr. DeFilippis made sexual advances toward women workers in Teledyne's Toronto plant. (Transcript, Vol. XXVIII, pp. 22, 23; 37, 38, 40-43).

Carol Collier had been administrative assistant to Mr. Frank Knight, President of Teledyne, from 1964 to 1973. She confirmed that because there were complaints by female workers at the Toronto plant that Mr. DeFilippis had been reprimanded by Mr. Knight, and solely because of this problem, Mr. DeFilippis was transferred to Teledyne's New York plant. (Transcript, Vol. XXVIII, pp. 47, 49-54). However, she did not personally know if Mr. DeFilippis was told by Mr. Knight as to

whether the sexual harassment allegations were the reason for the transfer. (Transcript, Vol. XXXVI, pp. 54, 55). She also said that after the transfer to New York that Mr. Knight had to fire Mr. DeFilippis because of an incident with a female worker in New York (Transcript, Vol. XXVIII, pp. 56-58).

Mrs. Collier testified that Mr. Knight was now about 75 years of age, and living in Gainesboro, Florida, with his wife, and that both were in ill health. (Transcript, Vol. XXVIII, p. 59).

I allowed Mr. Knight's sworn Affidavit, dated July 27, 1983 (Exhibit, # 116) in as evidence. It stated, in part,

> From 1965 approximately to January 1967 I operated from the Canadian place at 55 Underwriters Road, Toronto, Canada. Subsequently I physically moved to New York as President of all Stillman plants.
>
> Mr. DePhillipus(sp?) was employed by Stillman Canada during or prior to 1968 and came to my attention when several of our female employees complained of sexual harassment up to and including forcible contact in his capacity as their supervisor or group leader.
>
> My executive group at Stillman Canada insisted that he be terminated. At this time our Bronx plant in New York was drastically short of certain skills possessed by Mr. Dephillipus and after a warning lecture by me I authorized his employment in the Bronx plant. Within a year new sexual harassment charges surfaced in the Bronx from our women employees whose Bronx social environment left no doubt that the harassment was not a figment of the imagination. I personally interviewed these employees since I felt that I had some responsibility in the hiring of Mr. DePhillipus. The evidence was conclusive to me and I told Mr. DePhillipus that we must terminate him.
>
> Mr. DePhillipus raised the question as to re-employment at the Canadian Plant and I stated absolutely no. He then informed me that his immigration status in Canada would be seriously prejudiced by the discharge and I finally wrote him a letter of recommendation avoiding any specific reference to good character. The letter was obviously a major mistake in view of his apparent continuation of his past tactics which I now view as very serious.

It is clear from Mr. Knight's Affidavit that Mr. DeFilippis was told by Mr. Knight the true reason as to why Mr. DeFilippis was being transferred to New York, as

one would expect. Mr. Knight states that "after a warning lecture by me I authorized his employment in the Bronx plant." (Exhibit # 116). Further, it is obvious, if less explicit from the Affidavit, that Mr. DeFilippis was told by Mr. Knight as to the true reason for his termination of employment with Teledyne, as one would expect. Mr. Knight states,

> "The evidence was conclusive to me and I told Mr. DePhillipus that we must terminate him. Mr. DePhillipus raised the question as to re-employment at the Canadian plant and I stated absolutely no. (Exhibit # 116).

It is clear that Mr. DeFilippis consciously and continuously lied in his testimony about his employment record with Teledyne, as to why he was transferred to New York, and as to why he was terminated in his employment with Teledyne.

## 5. FINDINGS AND CONCLUSION IN RESPECT OF EVIDENCE.

Based on all the evidence, I have no doubt in concluding that the individual Respondent, Rafael DeFilippis, was guilty of sexual harassment toward each one of the six Complainants. It is clear that his personality and character is a considerable paradox, for a number of reasons. He is a bright, industrious, conscientious worker who, from the standpoint of simply economic efficiency and productivity, has been a very valuable foreman to Commodore. However, even in this regard, it is clear from the evidence that he was more than simply tough toward his workers - he was crude, rude, constantly name-calling, screaming and swearing at them, and often callous toward them. In his position as foreman he had power, and he abused that power generally in the way he spoke and dealt with his workers. However, that is a matter simply for Mr. DeFilippis and the management at Commodore, and the union if the plant is unionized, as the Pharmacy Avenue (but not the Warden Avenue) plant is. Being an obnoxious foreman, does not, of course, constitute sexual harassment and I have ignored this aspect of Mr. DeFilippis' character in coming to my conclusions.

Second, it is undisputed that Mr. DeFilippis had affairs with consenting female workers, and some might question his morals, either because he was married or because the females worked with him. However, Mr. DeFilippis' morality and social conduct is not, of course, in itself relevant to the issue of sexual harassment. I have also ignored this aspect of the evidence in coming to my conclusions.

From a factual standpoint, sexual harassment can be considered to include:

> Unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted;
>
> ... or
>
> Implied or expressed threat or reprisal, in the form either of actual reprisal or the denial of opportunity, for refusal to comply with a sexually oriented request;
>
> ... or

> Sexually oriented remarks and behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work.
>
> (Final Report of the Presidential Committee on Sexual Harassment, York University, January, 1982, at p. 2.)

In The Secret Oppression (1978, Toronto: Macmillan of Canda) Leah Cohen and Constance Backhouse discuss the range of behaviour considered by them to be forms of sexual harassment.

> Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.
>
> All women are targets for this type of male behaviour in normal social settings, and to some extent on the streets. When this kind of activity is transferred to the work setting women's vulnerability increases dramatically. It can poison a woman's work environment to the extent that her livelihood is in danger. There is the implicit message from the harasser that noncompliance will lead to reprisals.
>
> These reprisals can include threatened demotions, transfers, poor work assignments, unsatisfactory job evaluations, sabotaging of woman's work, sarcasm, denial of raises, benefits, and promotions, and in the final analysis, dismissal and a poor job reference. In no uncertain terms, it is made clear to the woman that she must give in to the harasser's sexual demands or suffer the employment-related consequences. (Cohen and Backhouse at 39-40, cited by Prof. Frederick H. Zemans in Ms. Kim Fullerton v. Davey C's Tavern, Glen Relph, and Zantav Limited; Ontario, Aug. 3, 1982, at p. 23).

The essence of sexual harassment is differential conduct toward a worker because of sex. It is clear from all the evidence that Mr. DeFilippis persistently sexually

propositioned, used language that was overtly or implicitly sexual in connotation, made sexual advances and on occasion touched for sexual reasons, female employees working under his control, and that he persisted in this conduct, even after their initial and continuing forcefully-stated rejections. I accept the evidence of the six Complainants in this regard, and reject the asserted attempted defences and explanations of Mr. DeFilippis. Wherever there is a contradiction between his evidence and that of the Complainants, I accept their evidence and reject his. He is a liar, and was prepared to say anything at all to extricate himself from the problem he confronted with the Complaints. He demonstrated a prodigious memory for the most insignificant detail when it seemed to serve his purpose. He would deny events that he thought could not be proven, or at least would simply come down to his word against that of someone else. For example, he denied the circumstances of his transfer and subsequent dismissal from his previous employment at Teledyne Stillman.

The six Complainants all impressed me as truthful witnesses. Moreover, their evidence was corroborated by the similar fact evidence of five female worker witnesses, Irma Farfan, Maria Vivanco, Anna Mercedes Gomez, Beatrix De La Cueva, and Cecilia Yanez, all of whom I found to be truthful witnesses. As well, some eight male worker witnesses, Jorge Perez, Jorge Ramirez, Roy Jover, Renford Armstrong, Alton Joseph Muise, Ivan Jaramillo, Isadore DeCairios and Cesar Bravo gave evidence that tended to confirm the allegations of sexual harassment by Mr. DeFilippis. I found them also to be truthful witnesses.

Finally, as I have said, the four female workers at the Pharmacy Avenue plant Melanthi Tsfantakis, Gina Kalousis, Dina Andrikopolous, and Rosa Morra, all impressed me very much as sincere, truthful witnesses. Even though they themselves are Complainants in separate complaints of their own, I have no doubt in accepting their testimony which, as similar fact evidence, tended to corroborate the six Complainants' testimony. The Respondents alleged that there was a conspiracy to lie on the part of the six Spanish-speaking Complainants. None of the four witnesses from the Pharmacy Avenue plant knew the Complainants and none of them are Spanish-speaking.

Respondents' counsel very meticulously analyzed all of the evidence in pursuit of establishing the defence of conspiracy. There were some inexplicable details and minor discrepencies in the evidence, which can be accounted for by the problem of accurate recollection after a lapse of time, and the lack of apparent significance to the observer of some events at the time of occurrence. The very tenuous defence of conspiracy, like a pyramid of cards founded upon a fragile premise, falls quickly to the

ground. The defence in this case would have required this Board to make significant adverse inferences of fact from the evidence, against the Complainants' assertions, by imagining that a plot existed through tying a few insignificant circumstances together. No plausible defence of a conspiracy was established. Moreover, on the issue of credibility, I have no doubt in accepting the evidence of the Complainants and above-named witnesses on their behalf, and rejecting the evidence of Mr. DeFilippis.

The above described discriminatory treatment, subjecting some women workers to continuing sexual advances, sexual talk, and sexual propositions in the face of their clear objections, is in itself unlawful sexual harassment in breach of the Code.

However, the circumstances of the instant case went beyond the above. It is clear that Mr. DeFilippis tried to intimidate and manipulate the female workers he desired sexually. He was in a position, as he knew, of being able to hire very dependent, immigrant female workers (very much needing work, not speaking English and being relatively inarticulate, and who perhaps appeared from their cultural backgrounds to more likely subject themselves to male authority) who he could seek to take sexual advantage of. He was careful to make sure there were no witnesses to his sexual advances. The women he chose were generally scared, and even terrified of him. They were afraid of being punished and even losing their jobs if they rejected him, they were afraid of not being believed if they reported him, afraid of losing their good reputations, and, for those who were married, were afraid of what their husbands might accuse them of, or what their husbands might do to Mr. DeFilippis if they learned what he was attempting.

Whenever he was rejected, Mr. DeFilippis would make life more miserable than usual for the women who had rebuffed him, criticizing constantly, being even more rude and crude than he generally was, often arbitrarily moving the women from one department to another, and generally being nasty. He would try to find fault with a relatively small detail of their work, or simply make up imaginary shortcomings, and then destroy the whole position of the lady as a functioning worker. He knows how to work upon their emotions and exaccerbate their fears, anxieties and nervousness. An example was his criticizing Mrs. Andrikopolous about going to the washroom and threatening to move her to a department he knew she did not want to go to. If confronted by a woman going to management, he would take the offensive, twist around what was being said, and simply try to dominate his accuser by shouting (the taped conversation of the meeting with Melanthi Tsfantakis is an example Exhibit # 40). Mr. DeFilippis is a clever individual who always has a quick answer, and will yell to beat down the opposition. He

is a whimsical tyrant who will feign anger and self-righteousness to get his opponent to retreat.

There was, undoubtedly, some paranoia on the part of some of the women. However, the cause of this paranoia in the first instance was Mr. DeFilippis' treatment of them, so that in their anxiety and nervousness they thought any and all adverse circumstances at work (such as a lead-hand moving them from machine to machine or reprimanding them) were due to Mr. DeFilippis' initiative.

As well, there was a great deal of gossip, petty jealousy, and perceived unfairness in treatment within the factory. Thus, the six Complainants saw Mr. DeFilippis as treating Cleo Arias with favourtism at work. In actual fact, I do not think he directly gave her unfair advantages, in the first instance, but rather, he put those women who rejected his sexual advances at a disadvantage by being particularly harsh and mean toward them. The Commodore Warden Avenue factory is, in reality, a place where every worker must look out for himself or herself, and Mr. DeFilippis knew how to take advantage of this by threatening to use his power as foreman.

One must wonder about the implausibility, at first appearance, of Mr. DeFilippis sexually harassing so many women and all the time having one worker as his mistress, and the further implausibility of continuing with sexual harassment after his move from the Warden Avenue plant to the Pharmacy Avenue plant after the six Complaints were made and were public knowledge. One cannot comment upon the reasons for Mr. DeFilippis' sexual proclivities, extraordinary as they are. I think the answer is that he just never felt inhibited in doing whatever he pleased to do in his relationship with his female workers, until this Hearing approached. He simply thought he could get away with whatever way he chose to use his power as foreman. The simple truth of all the evidence is that he sexually harassed the six Complainants at the Warden Avenue plant and then upon his transfer sexually harassed Mrs. Tsfantaksis, Mrs. Andrikopolous, Mrs. Kalousis and Mrs. Morra at the Pharmacy Avenue plant.

None of the six Complainants effectively complained to management at the Warden Avenue plant. In part this was due to the language barrier; there was simply not effective communication at the meetings that Mrs. Mejia and Mrs. Estrada had with Mr. Long (and Mr. Kellow at the meeting with Mrs. Estrada August 8, 1979). I think that this failure was due to the unintentional fault of both the Complainants and management. Mr. Kellow and Mr. Long should have been able to learn of Mrs. Estrada's detailed complaints on August 8, if they had taken the time and care to do so considering they had a nervous, fearful worker who had to speak through an interpreter and knew the foreman

who was the source of her problems was waiting outside the door. However, Mrs. Estrada made no attempt to see Mr. Kellow again before quitting October 5, 1979. Even though Ms. Benel had delivered a letter from her lawyer June 13, 1979, given the lead hand's criticisms to Mr. Long of her work on June 13, there was a plausible, if incorrect, basis for Mr. Long allowing Mr. DeFilippis to terminate her employment.

Essentially what happened was that the six Complainants were very fearful of Mr. DeFilippis and mangement, and probably would never have complained had Mrs. Mejia not taken the initiative after she was fired May 4, 1979. Mrs. Mejia and the other four (Mrs. Olarte had already left January 26, 1979), had gradually adopted the position that they simply were not going to suffer the abuse of Mr. DeFilippis anymore. They were gradually becoming more assertive and challenging his authority to treat them in the manner he was. The besieged became the beseigers, making veiled suggestions to Mr. DeFilippis that they were going to bring him to justice. This in turn caused Mr. DeFilippis to be more spiteful toward them and fearful of what they might do, so he fired Mrs. Mejia May 4, 1979, and terminated Mrs. Munoz as soon as he could manufacture an excuse (June 11, 1979) and Ms. Benel similarly when he knew she had gone to a lawyer (June 13, 1979), and proceeded to ignore Mrs. Biljak's sick benefits claim after she left June 13, 1979. Similarly, Mr. DeFilippis had fired Mrs. Mejia in May because she had rejected his sexual advances and because he was fearful that she might cause difficulties for him with senior management by complaining. Mr. DeFilippis wanted Mrs. Mejia, Mrs. Munoz, and Ms. Benel fired to get back at them for rejecting his sexual advances, and so that they could not cause him difficulties by complaining. It is clear from the evidence that they had seen a lawyer by early June about Mr. DeFilippis (Transcript, Vol. XXVII, p. 29). His conduct toward Mrs. Olarte had caused her to quit in January, 1979, and Mrs. Biljak had left due to illness, June 13, 1979.

The six Complainants did not effectively complain to management about the sexual harassment of Mr. DeFilippis, and when the accusations did surface August 8, 1979, through the phone call by Ms. Fern Gaspar of the Human Rights Commission, management put their trust in Mr. DeFilippis who denied the accusations. Instead of being truly fearful of the future ramifications of the Complaints, Mr. DeFilippis took the short term solution of a complete denial, even though Mr. Kellow said Commodore would pay the claims and he could keep his job subject to a reprimand. Mr. DeFilippis is a convincing talker and convinced Mr. Kellow of his innocence. Mr. DeFilippis did not really believe that the Complainants could establish his guilt, at least, did not believe that they could really stand up to him, and even rationalized in his own mind that he was

not guilty by projecting the 'fault' onto the Complainants and all those who might testify against him. So confident was he that he proceeded to treat women (Tsfantakis, Andrikopolous, Kalousis and Morra) at the Pharmacy Avenue plant in the same manner, and when they eventually complained to management, he would throw out the superfically plausible excuse that he could not now discipline female workers because, knowing of the six Warden Avenue plant Complaints, they would falsely allege sexual harassment. In his mind he was now the victim and should receive sympathy. Commodore's management continued to place their trust in Mr. DeFilippis even though, at least by the meeting in March, 1982 with Mrs. Tsfantakis they should have been becoming very suspicious.

The employment of Mrs. Mejia, Mrs. Munoz and Mrs. Benel was terminated by Mr. DeFilippis because he feared what they might do, and he wanted to spite them because they had rejected him, and similarly, the employment of Mrs. Olarte and Mrs. Estrada was constructively terminated, as they quit because of his treatment of them. Although Mrs. Biljak left because of illness, Mr. DeFilippis refused to cooperate in assisting her and her husband to claim sick benefits.

The Complainants were exploited because they were females, and because they were dependent and vulnerable. They needed work, and had to endure continuing sexual harassment if they wished to continue to work, and had to endure increased criticism, and insults and verbal abuse because they would not subject themselves to the sexual advances of their foreman. They endured this state of affairs for some time, then determined they would not take it anymore, whereupon Mrs. Olarte quit rather than take it further, Mrs. Mejia was fired because she was threatening to do something about their problem, and Mrs. Munoz was fired on a pretext to get rid of her as a potential problem causer and in retaliation for challenging the foreman's authority. Because Mrs. Benel was made anxious and nervous by the foreman's constant bothering of her she obtained a letter from a lawyer asking that such behaviour stop, whereupon she was fired by the foreman within one-half an hour, in effect, for daring to challenge his authority and for being a trouble-maker. Although Mrs. Estrada did obtain some relief because Mr. DeFilippis knew, of course, of senior management's awareness of the Complaints as of August 8, 1979, and that Mrs. Estrada had been interviewed by senior management that day, he continued to non-sexually harass and make life miserable for her to the point that she quit in October. Mr. DeFilippis had no respect for his female employees. That cannot be doubted when one observes his continuing behaviour from the standpoint of both sexual harassment, and work harassment, once he arrived at the Pharmacy Avenue

plant in 1981 and had Mrs. Tsfantakis, Mrs. Andrikopolous, Mrs. Kalousis, and Mrs. Morra under his charge. All of the Complainants, and the other female employee witnesses who testified on their behalf were frightened and humiliated by Mr. DeFilippis.

In assessing general damages, the factors to be considered as set forth in Torres v. Guerico supra (at D/873) should be considered and such factors vary somewhat from one Complainant to another. I shall not repeat all the specific details of harassment set forth in the evidence. The sexual harassment was generally physical as well as verbal, with a significa ' degree of aggressiveness and some physical contact. The harassment was frequent a persistent for most of the Complainants, but there were significantly different durations of employment. All suffered work harassment consequential to their rejections of their foreman's sexual advances. All suffered reprisal and three (Mrs. Mejia, Mrs. Munoz and Mrs. Benel) were fired because of their rejection of sexual advances and more significantly, because they were complaining about the sexual harassment and consequential, related work harassment. The harassment had a varied psychological impact upon the Complainants. In this regard, I think Mrs. Mejia suffered by far the most in terms of mental anguish by reason of Mr. DeFilippis' sexual harassment.

Mrs. Mejia was very upset and hurt by Mr. DeFilippis' treatment of her. She became very emotional during her testimony. His behaviour included some verbal and physical sexual harassment, but also a great deal of anger and nastiness toward her because he viewed her as the leader of the female workers who were challenging his authority and potentially causing problems for him by going to senior management or seeking help elsewhere. Mr. DeFilippis wanted female workers who were "pussycats" and Mrs. Mejia, and the others to a lesser extent behind her, were becoming independent of his power and authority which he thought allowed him to make any demands he pleased. He wanted to be rid of them.

The Warden Avenue factory, with Mr. DeFilippis as foreman, was a tough environment for workers, quite apart from the aspect of sexual harassment. Mr. DeFilippis was a tough, demanding foreman. However, with the added factor of sexual harassment it was made much more difficult for the female workers who found such advances repugnant. They now endured a difficult job that entailed hard work, but included unwelcomed, persistent verbal and physical advances of a sexual nature. Finally, once it became clear to Mr. DeFilippis that a female employee would continue to reject him, he made her position more difficult, imposing more work-related harassment. This exacerbated fears, anxiety and nervousness on the part of the female

workers. Indeed they were becoming somewhat paranoid, thinking that all the demands of their lead hands stemmed from the foreman's desire to make their lives difficult. The female Complainants eventually reacted with growing challenges toward Mr. DeFilippis who was treating them very improperly and unfairly. As they challenged his authority and threatened him with seeking redress elsewhere, he reacted with fear, wanting to be rid of them because they might cause him trouble and to spite them for not complying with his sexual advances. Those (Mrs. Olarte, Mrs. Estrada) who found the environment unbearable, quit. Mrs. Mejia, Mrs. Munoz, and Mrs. Benel were fired. Mrs. Biljak left because of illenss unrelated to the harassment and while she did not return after recovering because of the work environment she had experienced before leaving due to illess, I do not think her situation can properly be characterized as a constructive termination due to sexual harassment.

In discussing what constitutes "discrimination", Lord Reid stated in the House of Lords decision in Post Office v. Crouch (1974) 1 All E.R. 229, at p. 238:

> Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by some reason of the discrimination he is worse off than someone else in a comparable position against whom there has been no discrimination. It may not make much difference which meaning is taken but I prefer the latter as the more natural meaning of the word, and as the most appropriate in the present case.

In a U.S. decision, in considering the meaning of the words "discriminate" and "discrimination", Mr. Justice Burton stated, referring to the general ordinances of the City of Dayton, Ohio:

> "Discriminate" means to make a distinction in favour of or against the person or thing on the basis of the group, class or category to which the person belongs, rather than according to actual merit. "Discrimination" means the act of making a distinction in favour of or against a person or thing based on the group, class or category to which that person or thing belongs, rather than on individual merit.
> Courtner v. The National Cash Registry Co., 262 N.E. 2d 586 (1970).

Therefore, discrimination presumes a distinction between persons on a basis not related to merit. Unlawful discrimination occurs when discrimination is on the basis of one of the prohibited grounds set forth in the Code.

Specifically, I find Mr. DeFilippis to have been in breach of paragraphs 4(1)(b) and (g) of the Code in respect of the Complainants Olarte, Mejia, Benel, Munoz and Estrada, and in breach of paragraph 4(1)(g) of the Code in respect of the Complainant Biljak. The Complaints of Ms. Benel (Exhibit # 11) and Mrs. Munoz (Exhibit # 12) also alleged breaches of paragraphs 6(a) and (e) of the Code, which reads:

> 6. No person shall,
>
> (a) refuse to employ or to continue to employ any person;
>
> on the ground that such person
>
> (e) has made or may make a complaint under this Act.

I find that one reason for Mr. DeFilippis firing Ms. Benel was because she had complained to the Ontario Human Rights Commission about him, as he knew from the letter (Exhibit # 61) delivered by her lawyer to Commodore a few minutes before his firing her, on June 13, 1979. However, although he fired Mrs. Munoz on June 11, 1979, in part because he was worried she might cause him trouble by complaining to management, as of that point in time Mr. DeFilippis did not seem to have any knowledge that she might be considering to make a complaint under the Code.

Taking into account the varying circumstances of each Complainant, I would award general compensatory damages as follows:

(a) Mrs. Olarte - $1,500.00.

(b) Mrs. Biljak, Ms. Benel, Mrs. Estrada and Mrs. Munoz - $2,000.00 each.

(c) Mrs. Mejia - $4,000.00.

(Incidentally, if I had been considering the complaints of Mrs. Andrikopolous, Mrs. Kalousis, and Mrs. Morra, I would have made awards of $2,000.00 each in general damages to them).

I have reviewed the matter of compensation for lost wages following termination of employment in Torres, supra (at p. 68) and Rand, supra, (at pp. 68-81). An employee has a duty to mitigate, and an employer is only liable for the loss of wages for a reasonable time. An employer is not necessarily liable for wages covering the actual period of time that it takes an aggrieved Complainant to find new employment.

Wrongful dismissal cases were referred to by Respondent's counsel. It is clear that in an employment situation, as the employer may usually terminate by giving reasonable notice, that an employee who has been wrongfully dismissed is only entitled to damages equivalent to what he or she would have earned during the notice period. That is, the quantum of damages is determined by the length of notice that would have been reasonable in the given situation.

In Bardal v. Globe & Mail Ltd., 1960 O.W.N. 253, Chief Justice McRuer discussed the applicable principles in a wrongful dismissal. The measure of damages is considered "in the light of the terms of the employment and the character of the services to be rendered." (at p. 254). The length of service of the employee, the age of the employee, and the availability of similar employment, taking into consideration "the experience, training, and qualifications" of the employee, are relevant factors to determining a reasonable notice period (at p. 255).

The factors considered in wrongful dismissal cases should be kept in mind in quantifying damages in human rights cases. However, as I stated in Rand, the "Code is not concerned with wrongful dismissal per se but rather with the reasons for the dismissal." (at p. 79).

> There are many situations of wrongful dismissal that are not in contravention of the Code. It is these situations with which the common law rules with respect to wrongful dismissal are concerned. Where an employee is dismissed, as here, because of his creed, the remedy must reflect the purposes of the Code, which is to prevent dismissal for such reasons. The complainant must be compensated not only for his loss of employment but also for the infringement of his religious freedom and the resulting insult to his dignity.
>
> The approach to damages under tort law is, I think to be preferred. Applying the approach to human rights situations would make employers liable for damage that is reasonably foreseeable at the time of the discriminatory act. (Wagon Mound (1).)
>
> When an employee is dismissed because of his creed, the infringement of his relgious freedom and the insult to his dignity as well as his loss of income are all foreseeable and, thus, compensable (Hughes v. Lord Advocate).
>
> There remain two problems. First, there is the complainant who, unforeseeably, suffers more than an ordinary complainant would in similar circumstances. This is similar to the "thin skulled" plaintiff problem in

> tort law. As set forth above, such victims are treated specially under tort law. The general limitations to liability appear not to limit the special case of very vulnerable victims, once the type of injury is foreseeable to the tortfeasor. In some cases, in human rights situations, an employer may well know its employees' weaknesses (as here, where Mr. Tosh was well aware of how important Saturdays off were to Mr. Rand). In such cases, the particular aggravated harm done to an employee will be foreseeable, and thus, I think, give rise to an employer's liability for that harm. On the other hand, if the harm is not so foreseeable, it would be difficult to justify making a wrongdoer liable for such remote harm.
>
> The second problem involves finding the appropriate cut-off point in awarding damages under the Code by way of compensation for loss of income. In my view, a respondent is only liable for these damages for a reasonable period of time; a "reasonable" period of time being one that could be said to be reasonably foreseeable in the circumstances by a reasonable person if he had directed his mind to it. This would amount to the duration of time the employee could reasonably be expected to take in mitigating his loss by finding a comparable job. (at p. 79)

Decisions of the Ontario Labour Relations Board are helpful, by analogy, on the issue of the cut-off point for special damages under the Code by way of compensation for loss of income. In Retail Clerks International Association v. Little Bros. (Weston) Ltd). (1975) OLRB Rep. 83, the tribunal stated, at p. 91:

> 23. The grievor, however, is not entitled to any other compensation. When an innocent party experiences a breach of contract he is immediately shouldered with a duty to take reasonable steps to mitigate his losses. In other words, he must avoid avoidable losses and the justification for this duty stems from the policy that the purpose of damages in contract is compensation not penalization; (see E. Allan Farnsworth, Legal Remedies for Breach of Contract (1970), 70 Colum. L. Rev. 1,145) The Board has taken a similar stance in exercising its discretion under section 79 of the Act to award compensation. It requires a complainant, who has been discharged, to take reasonable steps to mitigate his losses (see Metropolitan Meat Packers Ltd. 62 CLLC 16,230; Murray Bros. Limited (1969) OLRB Rep. Feb. 1,194; and De Carlo Shoe Co. (1965) OLRB Rep. June 224). The policy behind the imposition of this duty parallels that in contract. Section 79 used the word "compensation" and therefore if a duty to mitigate did

> not accrue to a grievor a monetary award given under section 79 would constitute something more than pure compensation. This is so in that the losses experienced by someone who does not attempt to mitigate are not, in a very real sense, all caused by the employer - a portion of the loss will stem from a grievor foregoing other income producing opportunities. To order an employer to compensate a grievor for this aspect of his losses would be to penalize the employer and section 79 is not designed to accomplis this end. If an individual wants to penalize an employer for a breach of the Act he must seek consent to institute a prosecution under section 90 and, if granted, section 85, upon the requisite proof, will accomplish the objective.

It must be emphasized that in the instant case, there was no evidence that any of the Complainants sought other employment while they were at Commdoore, although given that they were working the afternoon shift, they could easily have telephoned or approached other employers during working hours. Moreover, the evidence was simply very skimpy of attempts to mitigate after termination of employment.

Taking into account the factors unique to each Complainant, I would award special damages for lost wages, as follows:

(a) Mrs. Olarte - (one week) $160.00.

(b) Mrs. Mejia, Mrs. Benel and Mrs. Munoz - (four weeks each) $640.00 each.

Mrs. Estrada did not claim lost wages, and Mrs. Biljak left because of illness.

Commodore should see that Mrs. Biljak's sick benefits are paid, assuming the proper medical forms are now complete, if they have not yet been paid. She and her husband were met by indifference by Commodore generally in trying to submit her claim, and Mr. DeFilippis in particular was not only not helping her in this regard, but spitefully making it difficult for her and her husband to submit the necessary completed forms. However, there was not sufficient evidence put before this Board of Inquiry to evaluate this claim or to quantify it.

## 6. THE ISSUE OF LIABILITY OF A RESPONDENT EMPLOYER FOR A BREACH OF THE CODE BY AN EMPLOYEE.

The question then arises as to whether the corporate Respondent, Commodore, is liable for the breaches of the Code by its foreman, the individual Respondent, Mr. DeFilippis. What are the possible bases for corporate liability in respect of breaches of the Code? Several issues arise in this regard, and much of the argument of counsel was addressed to this matter.

### (1) The Issue of Vicarious Liability.

Much of the following consideration of this topic is adapted from a previous decision of mine, Iancu v. Simcoe Country Board of Education, (Ontario: January 3, 1983), (1983) 4 C.H.R.R. D/1203. I shall review first, the common law generally with respect to 'vicarious liablity', and second, the question at hand, that of 'vicarious liability' in respect of a breach of the Code. However, the matter shall be considered in the context of both the Ontario Human Rights Code, Revised Statutes of Ontario, 1980, c. 340 (the "old Code) and the Human Rights Code, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982 (the "new Code").

#### (a) The Nature of Vicarious Liability.

Professor Atiyah, in his text, Vicarious Liability in the Law of Torts, (London, Butterworths, 1967), neatly sets forth the lines of distinction between vicarious liability and personal liability (at. p. 3).

> "Vicarious liability in the law of tort may be defined as a liability imposed by the law upon a person as a result of (1) a tortious act or omission by another, (2) some relationship between the actual tortfeasor and the defendant whom it is sought to make liable, and (3) some connection between the tortious act or omission and that relationship. In the modern law there are three and only three relationships which satisfy the second requirement of vicarious liability, namely that of master and servant, that of principal and agent, and that of employer and independent contractor. There is, however, an important difference between the first, and the other two of

> these relationships, since only in the case of master and servant is there any general rule imposing liability in all circumstances, whereas in the other two types of relationship, vicarious liability exists in particular situations only, and not as a general principle. In all three cases, on the other hand, the third condition of vicarious liability is required, namely some connection between the tortious act or omission and the relationship between the actual tortfeasor and the person sued. In the case of master and servant, this third requirement is expressed in the formula that the tort must have been committed in the servant's "course of employment". It will be submitted later that in this respect the law is the same in all three cases.
>
> In legal theory, vicarious liability is readily distinguishable from personal liability. There is generally an obvious difference between holding a person liable for his own torts and holding him liable for the torts of a servant, agent or independent contracter, and the difference is emphasised by the fact that in the modern law of torts liability is still generally based on some notion of "fault". A person is not, subject to well-known exceptions, generally liable in tort except where he has intentionally or negligently caused some loss or damage to the plaintiff. But the result of vicarious liability is to make one person compensate another for loss not due to his fault of his servant, agent, or independent contractor."

(b) Vicarious Liability in Tort at Common Law.

For a master to be liable for the tortious acts of his servant, the master must be able to control the manner in which the servant performs the work he is authorized by the master to perform.

In T. G. Bright v. Kerr (1939) SCR 63.), where a delivery man was found negligent in causing a traffic accident, Duff, C. J. C. said:

> The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and ... it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in "matters incidental to the doing of the acts, the performance of which has been entrusted to him". (At 70).

On the particular facts of that case the company was not found to be vicariously liable because it could not have controlled the delivery man's manner of driving had it wanted to. Here, the corporate Respondent, Commodore, obviously benefits by being able to delegate responsibility for hiring and firing, and supervision of workers to a plant foreman for each shift, and can direct its foreman with respect to the manner in which he is to perform these duties.

More directly on point, where a principal (or master) authorizes his agent (or servant) to perform a certain function but gives the agent (or servant) discretion as to the mode of performing it, the principal (or master) is vicariously liable where the function is performed improperly. A plant foreman is a servant (rather than an agent) of the corporate Respondent, but the law is the same on this point whether or not the principal is a servant or mere agent. In Sheppard Publishing Co. Ltd. v. Press Publishing Co. Ltd. ((1905), 10 OLR 243 9CA)), the defendant was found vicariously liable when, without its knowledge its sales agent made misrepresentations about the plaintiff in order to get the plaintiff's customers to buy from the defendant. In W.W. Sales Ltd., v. Edmonton ((1942) SCR 467), the defendant was found vicariously liable where it had authorized its servants to clean away rubbish without telling them how to do it and they started a fire which caused damage to the plaintiff's premises. In both cases, the agent or servant has performed acts he was authorized to do but had performed them in an unauthorized manner, and for that the employer was held liable. If, hypothetically, a business corporation were to give its plant foreman full authority to deal with workers without instructing him as to the proper grounds in doing so, it could be found vicariously liabile if he used for improper grounds, assuming there were tortious acts on his part.

(c) Vicarious Liability in Human Rights Cases.

In Oram and McLaren v. Pho (August 8, 1975, 9B.C. - J. Wood), where the complainants were refused service in a bar by the barmaid, a B.C. Board of Inquiry discussed whether the owner of the bar could be held vicariously liable for the barmaid's discriminatory conduct. The Board said that if the requirement was that the owner must be found to have personally contravened the Code before the owner could be held liable, this

> ... would provide a convenient loophole through which the owners and managers of public houses and other establishments which offer services or facilities

> customarily available to the public could escape responsibility for violations of the Code by having an agent or servant effect the denial and enforcing the discriminatory policy rather than doing so personally. Fortunately, the common law of this country is not so short-sighted. The law provides that a master is responsible for the wrongful act done by his servant in the course of his employment, (at p. 24).

The Board then quoted from Salmond on Torts and several tort cases. The Board found (at p. 29), that the owner had delegated to the barmaid full responsiblity for operating the bar and that this was sufficient evidence with which to attach full responsibility for her discriminatory acts to the owner. The Board, however, also went on to find (at p. 30), that the owner had, on the day in question, upheld the decision of the barmaid to refuse to serve the complainants. The owner, thereby, personally and directly committed a violation of the Code.

In Re Nelson et al. and Gubbins et al., ((1980) 106 DLR (3rd) 486, 17 BCLR 259 (BCSC)), Taylor, J. held that a master is not vicariously liable for its servant's discriminatory conduct constituting a breach of the Human Rights Code of British Columbia. The Board of Inquiry had found on the facts that the conduct of the rental agent, Mrs. Gubbins, when she refused to rent a housing unit to Native Indians had not been directed, condoned or adopted by the management corporation of the townhouse complex, Byron Price. The Board had found the management corporation was not itself in breach of the Code and had found it liable solely on the basis that its servant[1] was in breach of the Code. Taylor, J. reversed the Board's decision, pointing out that paragraph 17 (2) (c) of the B. C. Code only allows the Board to make orders for the payment of aggravated damages against "the person who contravened the Act" and cannot be read to allow orders to be made against other persons on the basis of vicarious liability. As Byron Price did not personally contravene the Code it could not be held liable. Craig, J. A., dismissing the appeal (Re Nelson et al. and Byron Price & Associates Ltd. (1981), 122 DLR (3rd) 340 (BCCA)), said (at p. 346-7):

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1 Taylor, J. resolved the preliminary dispute as to whether Mrs. Gubbins was Byron Price's servant by finding that she was because, although her wages were not paid by Byron Price, she was under its supervision and control. It directed her as to how she was to carry out her job.

The prime issue is, therefore, whether the respondent as an employer is vicariously liable for Mrs. Gubbins' contravention of the Code. Counsel for the appellant (complainant) submits that the legislation is remedial and to ensure this result a Court should hold that an employer is vicariously laible for contravention by an employee otherwise an "employer may 'benefit' from discriminatory policies, but avoid responsiblility for such acts by laying the blame at the hands of its employee. Counsel for the appellant submits that an order against an employee under the provisions of s. 17 (2) would, in many cases, be negatory because, generally, only an employer could comply with any of the orders which may be made under s. 17 (2), particularly orders under paras. (a) (b) and (c).

I have no doubt that the legislation is remedial and that in accordance with s. 8 of our Interpretation Act R. S. B. C. 1979, c. 206, it should be given such "fair, large and liberal interpretation as best ensures the attainment of its objects", but I have no doubt, also, that in striving for this interpretation a court should not ascribe a meaning to words in the legislation which would normally be inconsistent with the grammatical and ordinary sense of the words used in the Act as a whole. I think that there is much to be said for the view that an employer should bear responsibility, in some form, for discriminatory conduct of an employee in the course of his employment but that is a decision for the Legislature, not for a Court. Our sole concern is whether s. 17 of the Human Rights Code provides for vicarious liability. The operative phrase throughout s. 17 is "person who contravened this Act". In this case, the only conclusion is that the Board found that the respondent did not contravene the Act. Notwithstanding this finding, the board concluded that the respondent was "vicariously liable" for the contraventions of Mrs. Gubbins. While this result may be desirable, it cannot, in my opinion, be inferred from the legislation. To find the respondent "vicariously liable" would require reading words into the statute which are, in my opinion, not justified. As I have said, the operative words in s. 17 (2) are "person who contravened this Act". The board may order the person to pay aggravated damages under s. 17 (2) (c) only if a person contravenes the Act "knowingly or with a wanton disregard" - that is, if he personally contravenes the Act. The Board found that the respondent did not personally contravene the Act. It could not, therefore, make an order that the respondent pay "aggravated damages".

...

> (I)n my opinion, reading the words of the statute in their context and in their ordinary and grammatical sense it cannot be said that the respondent is vicariously liable. If the Leglislature had intended that an individual in the position of the respondent should be amenable to any of the orders which may be made under s. 17, it would have been a simple matter for the Legislature to have enacted words to the effect that any employer whose servant contravened the Act in the course of his employment would be deemed to have contravened the Act. The Legislature has not done so either expressly or impliedly.
>
> Craig, J. A. also said (at p. 345),:
>
> If I were satisfied that the board had found as fact that the respondent had "authorized, condoned, adopted and ratified the discriminatory conduct of Mrs. Gubbins, I would say that the board was correct, in law, in making an order against the respondent under s. 17 (2) (c) because, on the basis of that finding the Board could conclude that the respondent had, in effect, personally contravened the Act. I think, however, that the board did not make this finding of fact. On the contrary, I think that the board proceeded on the premises that the liability of the respondent was vicarious, not personal.

Section 19 (b) of the Ontario Human Rights Code also only allows the board to make orders against "any party who has contravened this Act".

In Hartling v. Timmins Board of Police Commissioners ((1981), 2 CHRR D/487), the Board of Police Commissioners was found liable for the Police Chief's discriminatory hiring practices. However, that case can be distinguished from the Nelson case, supra, because the Board of Police Commissioners was found not to be innocent of the Chief's practices. The Board of Inquiry (myself) found on the facts (at D/493), that the Board of Police Commissioners knew or ought to have known that the Chief was discriminating against women and that it did not try to deal effectively with the problem.

Its liability was held to be personal (at D/494). It was held liable because, in authorizing the Chief to recruit on its behalf, it "did not really set up, or enforce, a rigorous system for recruitment with objective standards, but rather left hiring largely to the subjective evaluation of the Chief". Also, it was held personally liable because it "knew, or most certainly should have known it if had performed its responsibilities with reasonable diligence, that Chief Schwantz was in breach of the Code in his recruitment

practices". Thus, the Board of Inquiry found that, because the Board of Police Commissioners knew the Code was being breached and because it did not actively do anything to ensure compliance with the Code, it condoned the practices of the Chief. In Nelson, supra, Craig, J. A. said that the master could be found personally liable if it condoned the discriminatory actions of its servant.

In Simms v. Ford Motor Company of Canada (June 4, 1979), the Board of Inquiry (H. Kreever) stated obiter (at p. 16), that if an employer stood by idly in the knowledge that his employees were using racially abusive language against a fellow employee in a manner that amounted to discrimination with regard to a condition of employment, the employer would be held liable for breach of the Code. The Board went on to say (at. p. 17), that:

> ... where an employer has adopted a policy against discriminatory treatment of, or language against, any employee and is unaware, and has no reason to believe that those instructions are being disobeyed, it is inconceivable to me that the employer automatically becomes guilty of a violation of Section 4 of the Code.

The Board suggested (at. p. 17) that the mere announcement of a policy against discriminatory conduct may be insufficient. The Board in Hartling, supra (at p. D/493) said that the passing of a "Hiring Policy" resolution was not sufficient.

These cases suggest that the employer is liable for a breach of the Code if it knows of its employee's breaches but does nothing to prevent them or remedy them. The employer has a defence if it acts with due diligence once it knows of the breach of the Code.

In Bell and Korcyak v. Ladas and the Flaming Steer Steak House ((1980), 1 C.H.R.R., D/155), a sexual harassment case, the Board of Inquiry (O. B. Shime, Q.C.) stated obiter (at. D/156) that:

> The law is quite clear that companies are liable where members of management, no matter what their rank, engage in other forms of discriminatory activity. Thus, companies have been held liable where lower ranking members of the management team engage in anti-union acitivity or discriminate against employees because of race or colour, and the same general law that imposes liability in those cases ought to apply where members of the management team discriminate because of sex.

> Thus, I would have no hesitation in finding the corporate respondent liable for a violation of the Code if one of its officers engaged in prohibited conduct and, indeed, the same liability would attach if the violator had a lower rank on the management team. (emphasis his)

No cases were cited in support of this statement of the law, and I do not think, with respect, that it is supportable as it is set forth. On the facts of that case, the manager who alleged to have committed the acts of sexual harassment was also the owner and officer of the corporation. Although not mentioned in the case, his acts would have been the acts of the corporation under the organic theory of corporate responsilibity (discussed infra) and the corporation therefore, might have been found liable personally for any breaches of the Code that he, as its directing mind and will, committed.

(2) The Organic Theory of Corporate Responsibility.

A factual situation similar to Bell arose in a recent Board of Inquiry, Cowell and Cox v. Gadhoke and Super Great Submarine et al (Ont. - Sept. 28, 1981), (1982) 3 C.H.R.R. D/609, where the sole shareholder and sole director of the respondent corporation was found to be in breach of the Code (at p. 33), having committed acts of sexual harassment. I held that in such a situation, under the organic theory of corporate responsibility, that the corporate respondent was itself in breach of the Code.

> "...(T)he corporate Respondent, in reality, was the alter ego of the individual Respondent. As Mr. Gadhoke was the directing mind of the corporate Respondent, it is clear that as a matter of corporate law, the corporation is responsible to the Complainants. (at p. 34).

It is necessary to briefly review the evolution of the organic theory of corporate responsibility. The cornerstone of general corporate law consists of the fundamental attribute of corporate personality being that the corporation is a legal entity entirely distinct and separate from its shareholders, (Salmon v. Salmon & Co (1987) A.C. 22.) That is, the corporate entity is a separate, legal personality, albeit an artificial person, capable of enjoying rights and duties just like a natural person.

The common law has evolved a wide doctrine of both agency and vicarious liability. Just as a natural person can be bound by the acts of his or her agent, so can a corporation. A contract, if the agent has real or apparent authority, is a contract between the third party and the agent's principal. In tort, as we have seen supra, if the relationship between the principal and agent amounts to a master-servant relationship and the servant is tortious in the course of his employment (e.g. negligently driving a delivery truck) there is liability on the part of the master on a vicarious liability basis.

However, in respect of some tortious situations the law did not allow for vicarious liability, but rather insisted upon personal fault being present on the part of the master as a prerequisite to liability. That is, the master himself had to be personally at fault to be liable.

The famous Lennard's case (Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., (1915) A.C. 705), is illustrative of the problem. The corporation owned a ship that was unseaworthy. Section 502 of the British Merchant's Shipping Act, 1894 (57 & 58 Vict. c. 60), provided for an exemption from vicarious liability on the part of the owner of the ship in certain situations, if there was no fault on his part. That is, the statute cut back upon the normal vicarious liability. The managing director was at fault in having an unseaworthy ship and this fault gave rise to the loss in question.

The issue was whether the shipowner corporation was liable notwithstanding the statutory requirement that the owner of a ship was liable for its unseaworthiness only if personal fault could be attributed to the owner.

The court held that the managing director was not merely a servant for the corporation in respect of whom the corporation could be liable for torts only upon a vicarious liability basis. If so, because of the statutory exemption for vicarious liability, there would be no liability. Rather, the court held that the managing director was someone for whom the corporation was liable because the managing director's actions were the very actions of the corporation itself. This might be otherwise expressed as saying that the managing director was the 'directing mind' of the corporation.

The decision extended the liability at common law of a corporation beyond that flowing from a normal master-servant relationship upon a vicarious liability basis. The corporation itself was a tortfeasor, as was the managing director, Lennard. The actions of the corporation are the actions of its directing mind.

A similar problem arises when the agent commits an intentional tort. For example, a managing director or a corporation causes a fraud to be perpetuated in the

course of carrying on its business. The problem in this regard, if the corporation is the master, is that it is difficult to say that the corporation can be personally at fault, it being an artificial personality rather than a real person. Therefore, if one takes a strictly logical approach in this regard, the corporation can only act through its officials and therefore it could not be liable, not having any personal fault itself. However, stemming from Lord Haldane's judgment in the Lennard's case, the courts have elected to treat the acts of certain corporate officials as those of the corporation itself and therefore attribute personal fault to the corporation. This is sometimes known as the "organic theory". The fault is attributed to the corporation as an extension, of those running the corporation's affairs. It is emphasized that this is not liability arising from agency law through a master-servant relationship with vicarious liability. Rather, the acts of the agent are treated as though they are those of the principal itself and therefore the corporation is liable on its own account for those acts. It is not liable upon a vicarious liability basis.

A distinction must be drawn between managing directors and the like whose intentions are attributed to the corporation itself, and simply subordinate employees who are mere servants.

Lord Haldane's principal in Lennard's case has been extended to, and exercised a powerful influence in, criminal law. Historically, as a matter of common law, there was generally no vicarious liability in respect of a crime. To constitute a crime there was need for mens rea (criminal intent or guilty mind). In more modern times statutory offences were created by the legislature which dispensed with mens rea and imposed vicarious liability upon the master for the crimes of the servant. Therefore, if the master was a corporation, there was no good reason why the master (corporation) should not be held liable even though it was a corporation. This was the first development in making corporations criminally liable, but obviously a statutory basis was required.

However, from the approach taken by the courts, in particular Lennard's case, certain officials' actions give rise to liability on the part of the corporation, even though the statute does not dispense with mens rea. Therefore, even though mens rea might be an essential element of a criminal offence, the knowledge, belief or intention of the managing directors or officers, i.e. the directing mind of the corporation, is considered by the courts to be that of the corporation. That is, the actions and intentions of certain officials are attributed to the corporation. They are not simply servants of it. The corporation itself is considered to have committed the crime.

In R. v. St. Lawrence Corp ((1960) 2 O.R. 305 (C.A.)), it was held that a corporation can have more than one alter ego. Large corporations have directing minds and wills in their various departments and in their branch offices. In that case the vice-president in charge of sales was found to be part of the directing mind, and the corporation was held responsible on that basis. Schroeder, J.A., held that the corporation is not responsible for the criminal acts of its servants or agents under the doctrine of vicarious liability.[1]

The organic theory is also seen to be applied in income tax law. Every person resident in Canada is liable for federal income tax by s. 2(1) of the Income Tax Act, S.C. 1970-71-72, c. 63, but there is no definition as to what is meant by "resident". The case law has held that for a corporation, residence is where some part of the central control and management (or directing mind) of the corporation actually abides (United Construction Co. Ltd. v. Bullock (1959) 3 All E. R. 831; (1960) A.C. 351 (H.L.)).

In my opinion, the organic theory of corporate responsibility applies in respect of breaches of the Ontario Human Rights Code. If an individual is in breach of

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1 Recently, Canadian Courts seem to have been moving closer towards a doctrine of criminal vicarious liability. In R. v. Waterloo Mercury Sales Ltd. (1975), 18 C.C.C. (2d) 248 (Alta. D.C.), the corporate defendant was convicted of fraud when its used car sales manager had, unknown to the directors and officers and contrary to their written instructions, turned back the car odometers prior to sale. The court found that, although the used car sales manager was not a director or officer of the corporation, he had been delegated the full responsibility for the buying (except that he could not sign cheques), repairing and selling of used cars. He was found to be the directing mind and will of the corporation in the sphere of used car sales.

In R. v. P.G. Marketplace (1980), 51 C.C.C. (2d) 185 (B.C.C.A.), the corporate defendant was found guilty of fraud where, unknown to the directors a salesman defrauded a customer. The court held that where there is a clear delegation of authority to a servant, that servant is the directing mind and will of the corporation in the sphere of his authority. This is very similar to the doctrine of vicarious liability whereby a corporation is liable for the tortious acts committed by a servant within the scope of his authority. The only difference between the organic theory of criminal liability and the tort doctrine of vicarious liability seems to be that, under the former, the servant's acts must be within the scope of his actual authority while, under the latter, the servant's acts must be within the scope of his actual or ostensible authority.

the Code, and the breach arises in the course of the individual acting as agent for the corporation in the carrying on of its business, and the individual is also the (or at least part of the) 'directing mind' of the corporation, then the corporation itself is in breach of the Code. Coxwell and Cox v. Gadhoke, (1982) 3 C.H.R.R. D/609, (See also McPherson et al., v. Mary's Donuts and Hachik Doshoian (Ont: June 23, 1982), supra, and Torres v. Royalty Kitchenware Limited and Francesco Guercio (Ont: April 8, 1982) supra), exemplifies an application of this view of the law, in the finding that the corporate respondent was in breach of the Code, given the finding that the individual who was the sole shareholder, principal officer, and sole or main director, was himself in breach of the Code because of sexual harassment in the course of carrying on the corporate respondent's business.

(3) A Continuation of a Consideration of Vicarious Liability in Human Rights Cases.

There are two human rights cases where the employer may have been found liable, simply on a doctrine of vicarious liability, but neither case specifically referred to the doctrine. In Fuller v. Candus Plastics Limited ((1981), 2 CHRR D/419), the Board of Inquiry (R. W. Kerr) found the company liable where its foreman, to whom it had been given nearly complete discretion in personnel decisions after initial hiring, dismissed an employee on the grounds of race, colour, and place of origin (among other reasons). In Morgan v. Toronto General Hospital (October 14, 1977), the Board of Inquiry (W.S. Tarnopolsky) found that the complainant had been denied employment by reason of place of origin, race and ancestry by the personnel manager. The Board said (at p. 29.), that:

> ...since he was clearly authorized by the Toronto General Hospital to make the initial decisions as to whether a person shall pass on to the Department concerned for a further interview, the refusal "to refer or to recruit", contrary to section 4(1)(a) of the Ontario Human Rights Code, was that of the Hospital.

Even though the Hospital was found (at p. 17), to be "not racist" and to be, at least in some hospital departments, an "equal opportunity employer", it was held liable for the discriminatory acts of its personnel manager.

In the Nelson case, supra, Taylor, J. suggested obiter (at DLR 492 and BCLR 265), that the common law gives a right to sue the employer of a person who

breaches the Code, "if the breach was committed during the course, and within the scope, of performance by a servant of duties of service" but that the Board of Inquiry did not have jurisdiction to grant common law relief. However, in Board of Governors of Seneca College v. Bhadauria ((1981), 124 DLR (2d) (SCC)), Laskin, C. J. C. held (at 195), that a complainant cannot sue in the courts for a breach of the Ontario Human Rights Code because the Code is comprehensive in its administrative and adjudicative features. The complainant must follow the procedure set out in the Code to redress the wrong. In that case, the complainant had alleged that she was denied employment on prohibited grounds. Laskin, C. J. C. also held (at p. 200), that refusal to employ, on any grounds, has never been recognized as giving rise to any liability in tort for discriminatory conduct.

(4) Provisions of the "New Code" Relevant to the Issue of an Employer's Liability.

It is useful at this point to consider as well the provisions of the new Code. Subsection 40(1) of the new Code allows a Board of Inquiry to make an order against a respondent party, providing a remedy to a complainant, where the right of the complainant under Part I of the new Code has been infringed in "contravention of Section 8". Paragraph 19(b) of the old Code, provides that a Board may make an order against any "party who has contravened this Act". Such a provision was interpreted by the B.C. court in Nelson to mean that a party against whom an order is directed must personally contravene the legislation.

In my opinion, both the old Code and new Code are saying in the quoted provisions, substantively the same thing, being the obvious requirement that a party must contravene the Code before an order can be made against him. Subsection 40(1) of the new Code does not expand upon the former paragraph 19(b) of the old Code in so far as resolving the question as to whether an employer must be personally in breach of the Code to have contravened the legislation, or whether there can be a contravention on a vicarious liability basis. To answer this, one must look to other provisions of the new Code.

Part I of the new Code sets forth the basic human rights, including,

> 4. (1)Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

9.1 (c) "equal" means subject to all requirements, qualifications, and considerations that are not a prohibited ground of discrimination.

Section 8, the concluding provision to Part I, provides that:

> No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Part II provides further, for constructive discrimination.

> s.10 A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or
> (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

I discussed these provisions at length in my recent decision as a Board of Inquiry in Morley Rand et al., v. Sealy Eastern Limited, Upholstery Division (June 14, 1982), (1982) 3 C.H.R.R. D/93.

The new Code is clear, in my opinion, in not requiring intent to discriminate, this being set forth expressly by legislative provision in section 10, and being the position arrived at in the case law as reviewed in Rand in the evolving interpretation of the old Code, until the recent court decision in Ontario Human Rights Commission v. Simpson Sears ((1980), 36 D.R. (2d) 59 (Div. Ct.); affirmed Ont. C.A.; appeal pending to the Supreme Court of Canada).

As well, as section 10 of the new Code refers to any situation indentified by a "prohibited ground", paragraph 10(a) thus makes clear that a respondent who has enacted a neutral employment condition which has a discriminatory result, may successfully defend by establishing that "the requirement, qualification or consideration

is a reasonable and bone fide one in the circumstances". That is, unlike subsection 4(6) of the old Code, there can be no argument that the defence is (reading subsection 4(6) of the old Code simply in a literal sense) limited to situations where "age, sex or marital status" are the prohibited grounds. Thus, section 10 of the new Code expressly extends the defence generally, being that position reached by the evolution of the case law (until the Simpson-Sears decision) in interpreting the old Code.

Finally, it seems clearly implicit to section 10 of the new Code that the onus falls upon the employer to bring himself within the exceptional situation constituting a defence, also being that approach reached by the evolution of the case law under the old Code.

As discussed in Rand, paragraph 10 (a) of the new Code provides the employer with a defence "where ... the requirement ... is reasonable ... in the circumstances." The stated legislated standard is "reasonable". My own interpretation of this provision is that an employer who could establish that the employment requirement was reasonable in terms of the needs of his business (for example, a store that was open on Saturdays) would have to go further and establish as well, that he could not reasonably accommodate a particular employee whose creed prevented him or her from working on Saturdays.

That is, the "reasonable ... in the circumstances" standard of section 10 of the new Code embraces two facets - the employer must show not only that there is an objective real need (it is "reasonable") for the general employment requirement that constructively discriminates against the particular employee, but also that this need of the employer cannot be met (in "the circumstances", it is not "reasonable" to be able to do so) by an accommodation of the particular employee. (Alternatively, the employer would have a successful defence if he could show that while reasonable accommodation was possible, it was offered and refused).

Subsection 4(1) of the new Code is more concise than subsection 4(1) of the old Code. The term "equal treatment" encompasses several forms of discrimination on prohibited grounds, for example, refusal to hire, refusal to refer, refusal to recruit, discrimination in a condition of employment, or maintenance of separate lines of progression.

Bearing in mind that human rights legislation must be interpreted liberally, it seems clear that 'unequal treatment' may include a refusal to accommodate. 'Unequal treatment' need not be direct (section 8) and therefore, a general employment condition

which may be intended to be neutral may "indirectly" result in 'unequal treatment'. Section 10 is, of course, even more explicit regarding the issue of intent, and clearly, intent to discriminate is not a prerequisite to a finding of discrimination. Furthermore, the requirement that a respondent attempt, if reasonably possible, to accommodate a complainant's religious practices flows very naturally from an interpretation of section 10.

The "reasonable and bona fide" clause is an exception to the general rule of section 10. Therefore, once a complainant makes out a prima facie case of discrimination because a seemingly neutral condition results in unequal treatment, the onus is upon the respondent to show that the condition was "reasonable and bona fide".

Subsections 22(1) and (2) deal with discriminatory employment advertising and a discriminatory application for employment.

> 22. - (1) The right under section 4 to equal treatment with respect to employment is infringed where an invitation to apply for employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.
>
> - (2) The right under section 4 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. (emphasis added).

These subsections also cover such situations where a complainant is required to meet certain qualifications that conflict with the complainant's religious tenets, such as, for example, working on the sabbath. Thus, an offending employment qualification, such as the stipulation that applicants must be clean shaven, in the advertisement or application form, would constitute discrimination with respect to the applicant's right under section 4.

Reading all of the above provisions of the new Code together, it is clear that they provide a broad basis of protection to persons from discrimination on prohibited grounds.

(5) Conclusions as to the Liability by an Employer for a Breach of the Code by an Employee.

References were made in argument by counsel as to the provisons of both the old Code and the new Code, in dealing with the important issue of employer liability.

From my review of the law, it seems to me that an employer would be personally in breach of either the new Code or the old Code in the following types of situations.

(1) Where the employer himself, by his own personal action, directly or indirectly, intentionally infringes a protected right, then he has, of course, contravened section 8 of the new Code.

Similarly, the employer could be in breach of section 4 of the old Code: for example, where an unincorporated, sole proprietorship refuses to employ on a prohibited ground; or under s. 3 of the old Code, where an unincorporated landlord discriminates against a complainant in the occupancy of a commercial unit on a prohibited ground - Blake v. Laconte (Ont., March 1980), (1980) 1 C.H.R.R. D/74.

(2) Where the employer does not intend to discriminate, but there is a constructive discrimination, then the employer is in contravention of sections 10 and 8 of the new Code. That is, the employer has personally breached the new Code.

Similarly, until the Simpson - Sears decision, supra, boards of inquiry had held that there could be a breach by an employer of section 4 of the old Code, where there was no intent to discriminate but simply constructive discrimination, (for example, by a neutral employment requirement or qualification that knowingly results in the exclusion of women, and the requirement or qualification is not a reasonable and bona fide one in the circumstances - Ann J. Colfer v. Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo J. Seguin (Ont., Jan. 13, 1979). (There is an appeal pending to the Supreme Court of Canada in respect of Simpson Sears).

(3) Where the employer himself takes no direct action of discrimination, but authorizes, condones, adopts, or ratifies an employee's discrimination, then the employer is himself personally liable for contravening the Code (whether on a basis of contravening section 8, or section 10 coupled with section 8 of the new Code) as it is the employer himself who has infringed or done, directly or indirectly, an act, "that infringes a right under this Part" (section 8 of the new Code). Section 8 of the new Code says "No person shall infringe or do ... anything that infringes a right ..." The employer is infringing or doing something by its mere passive inaction of allowing an infringement of a right in the workplace when the employer could rectify the situation. To do nothing can be, in the circumstances, to "do" something that "infringes a right" within the meaning of section 8.

Similarly, there could be a breach by an employer of section 4 of the old Code, (for example, the Hartling decision, referred to supra; or S.S. Dhillon v. F. W. Woolworth Company Limited (Ont., Feb. 12, 1982) (1982) 3 C.H.R.R. D/206, where the management in a warehouse "knew, or should as reasonable men acting as management have known, that there was regular, and significant verbal racial harassment" and "did not take reasonable steps to put an end, or at least minimize, the racial abuse." (p. 66)).

In Kotyk and Allary v. Canadian Employment and Immigration Commission, the facts of which have been referred to briefly, supra, the individual respondent was a manager of a Canada Employment Office who was found to have sexually harassed two female employees who worked in the office he managed, in contravention of the Canadian Human Rights Act.

The Tribunal also held the respondent, Canadian Employment and Immigration Commission, liable. The two complainants went to an immediate supervisor, who in turn contacted the manager of the regional office, Mr. Johnson. The Tribunal stated, (at p. 51):

> "It seems clear that Mr. Johnson, the person directly responsible for initiating an investigation, did not feel that the complaints of sexual harassment were serious, despite the recommendations of his staff. I am not suggesting that the employer conduct would necessarily

> have been blameworthy if they had investigated the complaints and found them to have been unfounded. However, the decision not to deal with the complaints at all is the point at issue. That decision suggests that the conduct of Mr. Chuba was condoned by the Director at Regional Office.

As a result, the Tribunal held, at p. 52:

> "In summary, I find that the respondent must accept both direct and indirect liability, the former by virtue of responsibility for the discriminatory conduct of a member of its management staff for the reasons stated, and the latter because of the failure to provide a workplace free from harassment or the fear of harassment.

(4) Where the employer is a corporate entity, and an employee is in contravention of either the new or the old Code, and that employee is part of the 'directing mind' of the corporation, then the employer corporation is itself personally in contravention. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. (For example, in Gadhoke, supra, where the sole managerial employee was guilty of sexual harassment, then the employer corporation was itself personally committing the act of sexual harassment. While they were not necessary facts to the result, in that case the individual respondent was not only the sole manager, but also was the owner (shareholder), a corporate officer, and corporate director. Any one of these factors, coupled with the improper act coming in the course of carrying on the corporation's business, would have rendered the corporation in personal contravention of the new Code. See also, for example, Torres, McPherson, Kotyk, supra.)

(5) The difficulty in applying the organic theory of corporate responsibility (as referred to in #4) comes in the factual determination as to whether the employee in question is part of the 'directing mind'. Gadhoke illustrates the obvious case - the individual respondent was the sole manager, the owner, corporate officer and corporate director. Other situations are not as easy. It seems to me that, generally speaking, whenever an employee

provides some function of management, that he is then part of the 'directing mind'. (Thus, in the Ontario decisions of Fuller, supra - where a foreman had nearly complete discretion in personal decisions - and in Morgan, supra - where a personnel manager had the discretionary authority to pass on an employment application for further consideration - one could say, I think, that the employees where performing a function as part of the 'directing mind', and the decisions could be rationalized on that basis). Thus, I would take a broad view of the range of factrual situations which are embraced within the concept of 'directing mind'. Once an employee is part of the directing mind, and the contravention of the Code comes in his performing his corporate function, the corporation is itself also personally in breach of the Code.

(6) Where an employee unlawfully (i.e. in contravention of the Code) causes the breach of a contract between his employer (the employee-agent's principal) and a complainant, then the employer is liable for a contravention of the Code under the common law in respect of agency, for the act of the employee-agent is the act of the employer principal so far as the third party complainant is concerned.

(7) The most difficult area then arises when none of the factors in #1 to #6 above are present. To return to Professor Atiyah's quoted statement on "vicarious liability", if the employee is a mere servant (not part of the 'directing mind', and there is not a contract between the employer and a third party that the servant-agent is causing a breach of) then is the employer liable for a contravention of either the new Code or the old Code by the employee in the course of his employment, even though there is no personal contravention of the Code by the employer?

Let us hypothesize a factual situation. Suppose an employee for a landlord refuses to rent to a prospective tenant, on a prohibited ground, in contravention of section 8 of the new Code. The employee does this notwithstanding the express general direction of the employer to all of its employees not to discriminate unlawfully. Before the aggrieved prospective tenant can complain to the landlord, the employee leases the premises to an innocent third party. Can the prospective tenant-complainant come

against the employer for the employee's breach of the new Code? That is, is the employer vicariously liable for the employee's breach? (I am assuming, for the sake of argument that the wrongdoing employee cannot be characterized as part of the 'directing mind' of the employer). If such a situation were to arise in respect of the old Code, the Nelson and Simms cases, supra, would suggest that as the employer is not personally in contravention of the old Code, then the old Code does not include liability on a vicarious basis. Moreover, applying the Ontario court's recent decision in Ontario Human Rights Commission v. Simpson Sears, supra, (which held that there is no liability under the old Code unless there is intent to discriminate) to the vicarious liability situation, it is clear that the old Code does not include liability on a vicarious basis.

Given the public policy underlying the purposes of the old Code, and the precept that it should be interpreted liberally as it is remedial legislation, one might assert that it could be interpreted otherwise, to render the employer vicariously liable in such a situation. Moreover, beyond the benefits to society as a whole through effectuating the public policy enunciated by the old Code, the obvious intent of the legislation is to protect the aggrieved complainant as an individual. The legislature seems to be of this view as a general proposition because the new Code has an express provision in respect of this question of 'vicarious liability'.

> 44. -(1) For the purpose of this Act, except subsection 2(2), subsection 4(2), section 6 and subsection 43(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. (emphasis mine)
>
> (2) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, a board of inquiry in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1).

Thus, under the new Code there is vicarious liability for the purpose of the Code, (except in 'harassment' situations (subsections 2 (2), 4(2) and 6) and where the offence provision (subsection 43(1) is involved) as the liability attaches to the employer even where the discriminatory act is done by a mere "employee" (i.e. not by someone who is part of the 'directing mind'). Moreover, this provision also covers the 'directing mind' factual circumstances (situations #4 and #5). Therefore, while situations #1 to #6 above would apply, in my opinion, in respect of a situation under the old Code given the development of the case law, subsection 44(1) of the new Code expressly imposes liability by statute in situations #4, #5, and #6, and goes further to cover situation #7, not covered by the old Code.

As a result, there is generally vicarious liability under the new Code for situation # 7 above, other than in the noted exceptional situations. Thus, the uncertain issue of 'vicarious liability' in situation #7 remains important only for the diminishing number of Boards of Inquiry considering complaints under the old Code.

However, the above analysis of the difference in the range of situations between #1 and #7 above remains very important for purposes of considering complaints under the new Code where the complaint relates to 'harassment' and thus is excepted from the 'vicarious liability' impact of subsection 44(1). The point is - the dividing line between situations of 'personal liability' (situations #1 to #6) and the situation of vicarious liability (#7) remains important. It is only in the #7 situation that an employer is not liable for the 'harassment' by an employee. If it is a situation of sexual harassment by a mere employee (i.e. not someone who is part of the directing mind) of the corporate employer, then it is clear by virtue of the excepting provision in subsection 44(1) that vicarious liability does not attach to the employer. However, if the employee sexually harassing is part of the directing mind of the employer, then while subsection 44(1) does not apply (i.e., there is no deeming of the discriminatory act of the employee to be the act of the employer) there can still be personal liability on the part of the employer on the theory as advanced in situations #4 and #5.

The approach of subsection 44(1) in expressly providing for vicarious liability is clearly consistent with, and facilitative of, the general public policy purposes of the new Code. The provision is also supportive of other specific provisions of the new Code. Subsection 40(1) provides for a board of inquiry to make an order "to achieve compliance with this Act" and "to make restitution, including monetary compensation, for loss ...". That is, in so far as the particular complainant is concerned, the effect of

the new Code is to provide the equivalent of a tort by statute. It is clear that the general benefits to society through enforcing the new Code, are largely to be achieved by extending, in effect, a civil remedy to individual, aggrieved complainants. It would be anomalous for an individual to have a broader scope for success against parties for torts under the common law (which allows for vicarious liability where there is a mere master-servant in the course of his employment) and yet be limited (by there being no vicarious liability) in seeking restitution for the breach of the new Code by a servant in the course of his employment. Discrimination on a prohibited ground is a statutory wrong that offends society and is thus a wrong against the public, but it is also in the nature of a tort against the individual - a tort being a civil wrong independent of contract. Is there any meaningful distinction between physical injury due to trespass or negligence, and injury due to discrimination on a prohibited ground? Subsection 44(1) has the impact of saying that there is no meaningful distinction - vicarious liability should generally attach to the employer where his employee discriminates in the course of his employment.

It is the old Code, of course, that applies to the situation before me, and I shall now deal with the evidence within the context of the above analysis of the law.

## 7. APPLICATION OF THE LAW IN RESPECT OF THE ISSUE OF WHETHER THERE IS LIABILITY BY THE RESPONDENT EMPLOYER, COMMODORE, FOR THE SEXUAL HARASSMENT OF THE INDIVIDUAL RESPONDENT EMPLOYEE, DEFILIPPIS.

Applying my analysis of the law as set forth in the previous section, it is clear that Commodore cannot be held liable for the sexual harassment of the Complainants by Mr. DeFilippis on the basis of 'vicarious liability'. However, in my view, and I so find, Commodore is personally liable to the Complainants on the basis that Commodore is personally in breach of the Code because of the discriminatory acts of the individual Respondent.

Quite clearly, neither Mr. Kellow, Mr. Bradbury, Mr. Long, nor Mr. Braude, the management of Commodore senior to Mr. DeFilippis, personally discriminated against any of the six Complainants. As individuals, it is clear they find sexual harassment to be abhorrent, and they did not want it in their factories.

Mr. Long and Mr. Kellow should have known at the time of Mr. Kellow speaking with Ms. McCormack, the lawyer for Ms. Benel, that there were allegations of a sexual nature as well as allegations of general work harassment. But this was a heated conversation (because of Mr. Kellow's anger), and any reference to sexual advances at this point came in the context of Mr. Long having superficially plausible reasons from Mr. DeFilippis and Mr. Sian, Ms. Benel's lead hand, that she would not take direction and hence, Mr. Long thought Mr. DeFilippis was justified in terminating her. Finally, there is disagreement as to the extent of sexual harassment allegations that came out at the meeting of August 8, 1979, with Mrs. Estrada, but that was a brief meeting, between the President , with an interpreter and an undoubtedly nervous employee. As I have already said, there was much room for misunderstanding and confusion as to what Mrs. Estrada's accusations were at this meeting. (This is not to necessarily agree with anyone's particular version as to what was said at the meeting).

As I have stated, I think it was a serious, but honest, error in judgment at the point in time (March, 1982) of Mr. Braude being aware of Ms. Tsfantakis' accusations of sexual harassment, not to be very suspicious of Mr. DeFilippis. Mr. DeFilippis knew quite clearly that management did not in any way condone sexual harassment on the part of any employee. He had been confronted specifically in 1975 by Mr. Bradbury about the

issue. Mr. Kellow, Mr. Bradbury, Mr. Long, and Mr. Braude all made an honest mistake in accepting Mr. DeFilippis' protestations of innocence. After the six Complaints were made known to Commodore, by Ms. Fern Gaspar telephoning Mr. Kellow, Mr. Kellow arranged a meeting the same day with Mrs. Estrada, the only one of the six Complainants still working with Commodore. Mr. Kellow and Commodore cooperated with Ms. Gaspar in her investigation. Mr. DeFilippis was continuing to protest his innocence to management. At a later point in time, Mr. Kellow spoke "one-on-one" with Mr. DeFilippis, insisting that he be told the truth, and holding out to Mr. DeFilippis that he could keep his job, subject only to a reprimand, and Commodore would pay the claims, if Mr. DeFilippis was guilty. When Mr. DeFilippis continued to insist upon his inocence, and insisted upon defending himself, Mr. Kellow accepted his word, and Commodore has stuck by him to the end of a lengthy and costly hearing. None of the senior management (Mr. Kellow, Mr. Bradbury and Mr. Long) personally condoned or acquiesced in Mr. DeFilippis' sexual harassment of the six Complainants. As individuals, I am sure they find sexual harassment to be abhorent (as well as recognize it as being unlawful) conduct.

However (as I have set forth in the previous section), where the employer is a corporate entity, and an employee is part of the 'directing mind' of the corporation, then the employer corporation is itself personally in contravention of the Code. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. In such a situation, the intent of the offending employee is attributed to the corporate entity, so that the corporate entity cannot be excused on the basis that it (being a legal, and not a real, personality) could not possibly intend to discriminate.

It is clear to me, and I so find, that Mr. DeFilippis provided a function of management as a foreman at the Warden Avenue plant, and therefore, he was part of Commodore's 'directing mind' such that his intent and acts of sexual harassment became those of the corporation. Mr. DeFilippis had the general power to hire and fire, and discipline employees. Mr. DeFilippis was, in effect, plant manager for almost all of the second shift. The shift commenced at 4:00 p.m. and the plant Manager, Mr. Long, left about 5:00 p.m., and from then until 12:30 a.m. Mr. DeFilippis was the senior employee of Commodore in charge of its operations and the premises. Thus, Mr. DeFilippis functioned as part of management, and hence, was a part of Commodore's directing mind. Even when Mr. Long was present, Mr. Long generally deferred to Mr. DeFilippis in the disciplining of, and hiring and firing, of employees. A good example is the firing of Mrs. Munoz. She had returned to work after illness, was regarded as a good worker, had

a doctor's certificate, and said her cousin had spoken with Mr. DeFilippis. Because Mr. DeFilippis said she had not called in to explain her absence, he was allowed to fire her. The point is, as far as the Complainants and other female workers on the afternoon shift were concerned, Mr. DeFilippis was the management. As foreman, Mr. DeFilippis was, in effect, the manager of operations of the factory for the afternoon shift.

All of the acts of sexual harassment occured in the course of carrying on the corporation's business at its Warden AVenue plant. Once an employee, like Mr. DeFilippis, is part of the directing mind, and the contraventions come in his performing his corporate function as they did in the instant case, a corporation such as Commodore is itself also personally in breach of the Code.

So far as the six Complainants were concerned, Mr. DeFilippis was, in effect,their true employer. Commodore put him in this position of management; therefore, this factor, coupled with Mr. DeFilippis' unlawful acts of sexual harassment coming within the course of carrying on the corporation's business, renders the corporation personally in breach of the Code. (See situations #4 and #5 discussed in the previous section).

As Commodore is liable on the above basis, it is not necessary to discuss at length whether Commodore is also personally liable on the basis that management senior to Mr. DeFilippis (Messrs. Bradbury, Long, Kellow and Braude or one or more of them) had actual knowledge of the sexual harassment and authorized or condoned Mr. DeFilippis' discriminatory conduct, or at the least, had constructive knowledge because they should have known, as reasonable men acting as management, that there was sexual harassment in the factory by Mr. DeFilippis. Counsel for the Ontario Human Rights Commission argued forcefully that there was actual, or at the least constructive, knowledge of such sexual harassment by the senior management.

Considering all the evidence, I would find the senior management did not have actual or constructive knowledge of the sexual harassment by Mr. DeFilippis in respect of the six Complainants such as to render the corporation personally liable on this basis. (See situation #3 in the previous section, supra).

I found Mr. Kellow, Mr. Long, Mr. Bradbury and Mr. Braude to be trying to be truthful in giving their evidence. There were discrepencies in the evidence, but they were minor and insignificant in the context of the totality of the evidence. Much was made as to when the accusation of "sexual harassment" was first made to senior management. But in 1979, there was no established law on sexual harassment in

Ontario. The first Canadian case reported was Bell, supra, in the fall of 1980, although it did receive broad media coverage at the time. "Sexual harassment" as a 'buzzword' used by the public was not at all common in 1979, and certainly was not known by the public as being an unlawful act. Times have changed, and consciousness of the malaise due to sexual harassment in the workplace has been raised significantly, and this is due in significant part to the work of the Ontario Human Rights Commission.

As well, the factual situation pertaining to these six Complaints arose largely in 1979 or earlier, and it is not surprising that there is some honest difference of opinion as to what precisely was said four years previously.

None of the six Complainants approached senior management until Mrs. Mejia May 8, 1979, followed by Ms. Benel on June 13, 1979. At these all too-brief meetings, Mr. DeFilippis dominated the discussions. The Complainants were intimidated by the prospect of going to mangement for a number of understandable reasons, but the fact is they did not approach management often, and it was generally only after they found themselves in difficult circumstances. This is not to in any way fault them but rather to suggest that there was some plausibility to the position of senior management, from their perception, that the complaints against Mr. DeFilippis were really directed against his harsh personality as a foreman, and not significantly related to sexual abuse by him. There was also a language barrier between the Complainants and the English-speaking senior management. However, when they did approach Mr. Long, he honestly believed Mr. DeFilippis' protestations of innocence. Similarly did Mr. Kellow, Mr. Bradbury and Mr. Braude. Theirs was an honest error of judgment and trust. They believed the man whom they had worked with for some time and who was a highly valued employee.

However, while I think that it was still an honest error in judgment, in my opinion, at the point that Mrs. Tsfantakis complained to senior management at the Pharmacy Avenue plant, in the person of Mr. Braude, there should have been a realization that there was a good possibility of regular and significant sexual harassment by Mr. DeFilippis of female employees, and management should have taken reasonable steps to determine the matter and end the harassment. If complaints by Mrs. Tsfantakis, Mrs. Andrikopolous, and Mrs. Kalousis were before me, I would have held that as of the point in time of Mrs. Tsfantakis going to Mr. Braude, Commodore was personally liable for the sexual harassment of Mr. DeFilippis on the basis of constructive knowledge. At that point, senior management should have known there was a probability of sexual harassment in the Pharmacy Avenue factory, and taken reasonable steps to end, or at

least minimize same, and the failure at that point in time to provide a workplace free from harassment or the fear of harassment would render Commodore personally liable for a breach of the Code on this basis (See situation #3 in the previous section, supra).

## 8. PUNITIVE DAMAGES.

I have reviewed at length the law with respect to damages in human rights cases in Hartling v. Timmins Police Force et al., supra, Torres v. Guercio supra, and Rand v. Sealy Eastern Limited, Upholstery Division (at pp. 67-81), supra. In Guercio, I considered the issue of punitive damages, (at pp. 50, 51):

> In summary then, a variety of awards have been made under (the present) Section 19; awards that are other than compensatory. Their purpose is to educate wrongdoers and ultimately, to ensure future compliance with the Code.
>
> The question with respect to punitive damages, then, is: are awards of punitive damages consistent with the above purposes? The reasoning of the Board in Shirley Gabiddon v. S. Golas (S. N. Lederman, July 9, 1973, at p. 33) was that punitive damages cannot be awarded under the Code, for two reasons: (1) the empowering section, (now section 19), refers only to "compensation"; and (2) a punishment provision is contained in Part IV of the Code (now section 21), which accordingly implies that punishment is beyond the sphere of Board powers. While I agree with this reasoning as meaning, at the least, that punitive damages certainly should not generally be awarded, I am not certain that it is a proper interpretation of the Code to say that they never can be awarded.
>
> In certain cases, it may be highly instructive for a respondent to face the paying of a penalty. If the Board is of the opinion that no other order could be so effective as to encourage future compliance with the Code as a punitive order, then I believe that an order of punitive damages might be proper. Such an award would be consistent with the educative purposes of the Code. It must be pointed out though, that such an award should have as its sole purpose the prevention of future breaches of the Code. That is, the penalty should be made only to effect deterrence, not to denounce the act or wrongdoer, nor to exact retribution. Any aim other than "full compliance" with the Code, i.e. deterrence from future breaches, would certainly be, in my opinion, beyond the powers of a Board of Inquiry.
>
> Even if this interpretation is correct, punitive awards would be very rarely made. For most respondents, the mere participation in inquiry proceedings or the awarding of compensatory damages alone will have a deterrent effect. Only where a Board is of the opinion that a greater deterrent is needed would punitive damages be necessary. One can speculate that this might be true in some sexual harassment cases. However, I find that in any event the situation posed in

the Inquiry presently before me does not suggest that an exceptional, punitive award, be considered.

A decision of the Ontario Labour Relations Board in United Steelworkers of America v. Radio Shack (1979) OLRB 1220, is also pertinent.

(1) A Remedy is Not A Penalty

94. If deterrence was all that the Board had to keep in mind, it would be a simple matter to set up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating the Labour Relations Act. But the Legislature did not provide the Board with this role and probably with good reason. See Little Bros. (Weston) Limited (1975) OLRB Rep. Jan. 83, at 91. Section 85 of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See Criminal Code, R.S.C. 1970, c. C-34, s. 5, 423 (2)(a); Re Regina v Gralewicz et al (1979), 45 C.C.C. (2d) 188 (Ont. C.A.) By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section 79 with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment. It it were otherwise, the Board's accommodative and settlement role under section 79 and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their candor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution of a complaint. Indeed, settlement and compromise might have to give way to a public clamor for a more tangible enforcement of the legislation not unlike the current concern over plea bargaining in the criminal law context. Labour law has historically been more interested in accommodation than "two-fisted" enforcement. But of course, the failure to comply with a Board order can result in the application of penalties by the Court in the exercise of the Court's contempt jurisdiciton.

...

(2) Monetary Relief is Compensatory

> 96. This is a corollary to the no-punishment principle. While it may be discouraging to the Board where, for example, the reinstatement of an employee with back pay, is simply inadequate to deter repeated offences, this is not justification for the applicaiton of additional monetary penalties in the guise of compensation. Thus, it is conceivable that the Board might change its policy and no longer require the mitigation of losses by employees who are subject to an unfair labour practice discharge. The change might be justified by the argument that the employer is paying no more than he would have had to pay had the person been employed up to the date of his reinstatement. However, it would be clear to those who regularly appear before the Board that our primary purpose was more in the vein of making unfair labour practice compensation orders more painful. On the other hand, our back-pay and compensation awards should be as fully compensatory as possible and, on request, could bear interest. Our approach might be analogous to that provided for by The Judicature Act, R.S.O. 1970,, c. 228, as amended S.O. 1977 c. 51, s. 38. See also Sedgewick and Metropolitan Toronto Zoological Society (1979), 22 O.R. (2d) 225.

While I remain very skeptical that punitive damages can be awarded, in human rights cases, assuming they can be for the sake of argument, should they be awarded in the case at hand? Commission counsel referred to this case as the "worst" sexual harassment situation that has come before a Board of Inquiry in Ontario to date. Beyond emphasizing the very serious nature of the harassment faced by the six Complainants, she emphasized that we are confronted with a situation where the individual Respondent continued to sexually harass female workers, even after he was faced with the six Complaints and had moved to another Commodore factory.

I agree with that assessment. However, I have no doubt in saying that the situation posed in the present Inquiry does not, to my mind, suggest that an exceptional, punitive award be given.

The individual Respondent is faced with a very sizeable award against him in the form of compensation due to the six Complainants. Mr. DeFilippis has been made subject to the scrutiny of the community by the very close coverage in the media of these proceedings. He and his family have undoubtedly suffered a great deal of embarassment in public at the most extraordinary revelations during the hearing. His relationship with his employer has most certainly been compromised and perhaps placed in jeopardy.

Mr. DeFilippis continues to profess his innocence. He shows no remorse for his victims, and at most feels sorry for himself in terms of the predicament he has found himself in. However, the awarding of more than compensatory damages would not add to the deterrent effect of the proceeding itself, my findings and the award of compensation. A punitive award as suggested by Commission cousel would only introduce an element of retribution, an act of vengeance. A main purpose of a Board of Inquiry (or any tribunal or court adjudicating rights) is to provide a forum for the peaceful resolution of a dispute and thereby prevent or lessen the possibility of acts of private vengeance. It would pervert the purpose of the Tribunal to seek it to become an instrument of vengeance. Moreover, to make an order to further a desire for vengeance would, quite clearly, be beyond the jurisdiction of a board of inquiry.

## 9. THE AWARDING OF INTEREST AND COSTS IN HUMAN RIGHTS CASES.

Commission counsel submitted that interest should be payable in respect of any award given, and counsel for Respondents submitted that costs should be awarded if the Complaints were dismissed. There is no reported case of an award of "interest" and/or "costs" by an Ontario Board of Inquiry.

### (1) Interest.

There is no provision in the old Code or the new Code with respect to the payment of interest on compensatory awards made by a board of inquiry. Nor are there any such provisons in other provincial or federal human rights legislation.

Paragraph 19(b) of the old Code, which permits the board to order the party who contravened the Code to compensate any person for any injury thereby caused, seems broad enough to include an order with respect to the payment of interest. There have been no Ontario board of inquiry decisions on this point.

Subsection 40(1) of the new Code is more explicit with respect to the orders a board may make. Under paragraph 40(1)(b), the board may only order compensation "for loss arising out of the infringement" which may include, if the infringement was engaged in wilfully or recklessly, an award for "mental anguish".

In Alberta, there have been two cases in which interest was awarded. In Re A. G. Alta. and Gares ((1976), 67 D.L.R. (3d) 635 (Alta. S. C.)) where the court found that the hospital was paying its nurses' aides lower wages for doing the same work as nursing orderlies, the hospital was ordered to pay the difference in pay retroactive to the date of the complaint. It was also ordered, by the court, to pay interest of 6% on the difference in rates of pay from the time of each monthly payment of wages from the date the complaints were filed until the date of the order. The board of inquiry in Civil Service Assoc. of Alta. v. Foothills Provincial General Hospital, (June 30, 1977; Alberta - J.D. Hill) where the facts were similar, followed Gares, awarding the interest on the same terms.

In Quebec, where human rights cases are heard by a Provincial Court Judge, interest is awarded from the date the writ was served. (See, for example, Larouche v. Emergency Car Rental (1980) 1 C.H.R.R. D/119, where there was sex discrimination in a car rental and Aronoff v. Mr. and Mrs. Hawryluk (1981) 2 C.H.R.R. D/534 (Que. Prov. Ct.) where there was a denial of rental accommodation because of marital status).

Paragraph 19(b) of the Code provides that a Board may make an order "to make compensation" for an injury to a Complainant. In my opinion, the notion of "compensation" includes an interest value component for the period of time from the date of notification of the injury to the date of the order of compensation being made by the tribunal.

Under the Ontario Judicature Act R.S.O. 1980, c. 223, as amended, section 36 sets forth provisions and standards for the calculation of interest in civil actions, and section 37(1) provides that a judgment bears interest at the prime rate from the date of judgment. Subsection 37(2) permits a judge to disallow interest, to fix a different rate of interest, or to fix a different date from which interest is to run. The Judicature Act applies only to civil proceedings.

The Judicature Act, sets forth the requirements and standards for the determination of interest in civil actions. It should serve as the standard for the purpose of calculating interest in a human rights action. In the instant proceeding, there are claims for special damages and general damages. In my view, an appropriate starting point for the calculation of interest in a human rights matter is the date of service of the Complaint. That date was not clearly specified in this proceeding but it must have been some weeks before October, 1979. The Judicature Act, while it specifies the determination of a rate of interest, also provides (subsection 36(6)) that a court can fix a rate that is just in all the circumstances. Applying this standard, it seems to me in the peculiar circumstances of this case, that a rate of 10%, not compounded, applied for 48 months to the special and general damages, is just in all the circumstances. Accordingly, interest is payable as follows:

(1) Mrs. Olarte - $664.00.

(2) Mrs. Biljak and Mrs. Estrada - $800.00 each.

(3) Mrs. Munoz and Mrs. Benel - $1,056.00 each.

(4) Mrs. Mejia - $1,856.00.

(2) Costs.

(i) Ontario

The old Code says nothing of costs. Paragraph 19(b) allows the board to order the party who contravened the Act to make compensation for any injury caused to any person and, arguably, this might include an order that such party pay the Commission's and Complainant's costs. There are no provisions that would seem to allow the board to award costs in favour of the Respondent.

In Amber v. Mr. and Mrs. Leder (April 10, 1970; Ont. - W. S. Tarnopolsky), the board suggested that in some circumstances it might award a complainant costs but that, in that case, costs were not appropriate. After the board of inquiry had been appointed, the Commission decided that the Respondent's offer of settlement was reasonable and that, therefore, the hearing before the board should not proceed. The Complainant insisted that the hearing proceed and, believing the Commission's position to be contrary to her own, hired her own counsel to represent her before the board. The board decided that once a board of inquiry had been appointed by a Minister it could not be terminated by the Commission but then denied her costs because it found that the Commission had not acted unreasonably and that the hearing, although it had been allowed to proceed at the request of the Complainant, had really been unnecessary (at p. 19).

In Hadley v. City of Mississauga (May 21, 1976; Ont. - S. N. Lederman), the board of inquiry also suggested that costs might be awarded under paragraph 19(b) but that they were not appropriate in that case. The board said:

> The Ontario Human Rights Commission is compelled by s. 14b(1)(a) (now 18(1)(a)) to have carriage of the complaint and in this inquiry, the matter was prosecuted by very able counsel on behalf of the Commission. In the usual case the interests of the Commission and the Complainant are the same. That was the situation here as there was no conflict in the position taken by the Commission and the Complainant. Although the Complainant is entitled to be represented by counsel, in the instant case, it was somewhat redundant to have two counsel present as there was an identity of interests between the two parties. If the positions had been diverse, then an award as to costs with respect to the complainant's personal counsel migh have been justified (at p. 33,34).

However, in Chia-Su Wan et al., v. Greygo Gardens et al., (March 8, 1982. - Ont., R. W. Kerr), the board of inquiry decided that costs cannot be awarded under the

present Code. One of the complainants had requested that she be reimbursed for her travel expenses to attend the hearing. The board said:

> With respect to Mrs. Chen's claim for train fare, I would observe that this item related to the conduct of the hearing and not directly to the Respondent's wrongful acts. In ordinary civil litigation it would be regarded as a matter of costs, rather than as part of the claim for damages. There is no express provision for an award of costs under the Human Rights Code. In my view, the distinction between a compensation for loss and the costs of a legal action is sufficiently well-known that the legislature would have expressly provided for recovery of costs under the Code had it intended to authorize such an award. Since section 19(b) of the Code provides only for compensation, I conclude that an award for an item in the nature of costs, such as Mrs. Chen's train fare to attend the hearing, is not within my jurisdiction (at pp. 17-18).

This interpretation is supported by the fact that the new Code expressly permits the board to award the respondent his costs when it dismisses the complaint. Subsection 40(6) provides:

> Where, upon dismissing a complaint, the board of inquiry finds that,
>
> (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
> (b) in the particular circumstances undue hardship was caused to the person complained against, the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

There is no provision permitting the baord to award the complainant any costs he incurs during the hearing. Paragraph 40(1)(b) only permits the board to award monetary compensation "for loss arising out of the infringement".

(ii) Other Jurisdictions.

The B.C. Human Rights Code (R.S.B.C. 1979, c. 186), subsection 17(3), and the Alberta Individual Rights Protection Act (R.S.A. 1980, c. I-2), subsection 31(2), both

provide that, "A board of inquiry may make any order as to costs that it considers appropriate". Saskatchewan Regulation 216/79 (made persuant to section 46 of the Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1), subsection 30(1) provides that, "The Board may, in its discretion, order costs."

In Andy Chelsea v. Sportsman's Motels, ((1981), 2 C.H.R.R. D/424 (B.C. - D.D. Owen-Flood) the Respondent was ordered to pay the costs of the Director of the Human Rights Branch under subsection 17(3) of the B.C. Code. In Mumtax Fazal v. Chinook Tours (1981), 2 C.H.R.R. D/472 (Alta. - M. D. McGowan), an Alberta board of inquiry, on dismissing the complaint, ordered the Commission to pay the Respondent's costs.

In Jorgensen v. B.C. Ice and Cold Storage et al., (1981), 2 C.H.R.R. D/289 (B.C.), appealed on other grounds, the board, on dismissing the complaint, chose not to award the Respondent its costs because the board had found that, although there had been no sex discrimination, the Respondent had not had "just cause" for dismissing the Complainant from her employment. This could be a reason for not awarding the Respondent its costs under the new Code in Ontario. Where an employee is wrongfully dismissed, the circumstances are often such, that it is difficult to ascertain whether the dismissal was for reasons prohibited by the Code or for other improper reasons. A Complaint filed under these circumstances would not be "trivial, frivolous, vexatious or made in bad faith".

In Oram and McLaren v. Pho (August 8, 1975; B.C. - J. Wood), the board held that it does not have jurisdiction to order that costs be taxed. Under subsection 17(3) of the B.C. Code, the board fixed the amount owed by the Respondent at $375.00. Subsection 40(6) of the new Code in Ontario requires that the costs be fixed by the board.

In Quebec, where human rights cases are tried by a Provincial Court Judge, costs are generally awarded against the Commission when the complaint is dismissed and against the defendant when he is found to have violated the Quebec Charter of Human Rights and Freedoms, (R.S.Q. 1977, C.C. - 12) (See, for example, Spears v. Antoniadis (1980), 1 C.H.R.R. D/188 (Que. Prov. Ct.); Leclair v. Paquet et Paquet (1981), 2 C.H.R.R. D/444 (Que. Prov. Ct.); Nye v. Burke (1981), 2 C.H.R.R. D/538 (Que. Prov. Ct.); Desilu and Chery v. Cafe Tropicana Inc. (1980), 1 C.H.R.R. D/89 (Que. Prov. Ct.); Larouche v. Emergency Car Rental (1980), 1 C.H.R.R. D/111 (Que. Prov. Ct.); Lachance-Levesque v. Thivierge (1980), 1 C.H.R.R. D/191 (Que. Prov. Ct.); Aronoff v. Hawryluk (1981), 2 C.H.R.R. D/534 (Que. Prov. Ct.))

Generally, when courts decide motions for judicial review or appeals from board of inquiry decisions they award costs to the winning party. (In Can. Footbal League v. C.H.R.C. (1980), 1 C.H.R.R. D/45 (F.C.T.D.), and A.G. Can v. C.H.R.C. (1980), 1 C.H.R.R. D/91 (F.C.T.D.), motions for prohibition were denied with costs. In O.H.R.C. v. The Borough of Etobicoke, (1982), 132 D.L.R. (3d) 14, (S.C.C.), the appeal was allowed with costs).

## 10. OTHER REMEDIES SOUGHT.

Commission counsel sought several other remedies. She asked for reinstatement but on the basis that the Complainants, if they again took positions with Commodore, not be supervised by Mr. DeFilippis. Although there was no indication by any of the Complainants that there is a desire to again work for Commodore, I think the Complainants should have the opportunity of working with Commodore again, if they wish to and if and as there are openings. However, although I could impose an order for reinstatement I do not think, in the circumstances, that it is either necessary or appropriate. No present employee should be displaced because of any right of reinstatement being extended to the Complainants, if an order were to be made.

The Complainants have the right, as with anyone else, to apply in the future for any position with Commodore if a vacancy arises, and to be considered on the merits.

As well, I do not think a Board of Inquiry should impose a condition that a reinstated worker not be supervised by a particular foreman. I am doubtful that Mr. DeFilippis would be other than vindictive toward the Complainants, if he ever had the opportunity to do so. However, it is for the employer to determine the positions of workers and foreman, and working conditions generally, provided this is done in compliance with the law. The employer has to be responsible, and if fails to be so, it is, of course, answerable under the law.

Similarly, Commission counsel asked for policing mechanisms to be imposed, for example, that if Mr. DeFilippis remains foreman, that he cannot discipline a female employee without the approval of a more senior manager. There were two problems with this suggestion. First, it is very difficult to make such a requirement workable. Second, and more significantly, for the reasons expressed above, it is the right and responsibility of the employer to determine the specific nature of working conditions including the hiring and firing process, provided such process complies with the law. It is not for a tribunal to tell an employer what the chain of authority will be, or who will make certain decisions, in the employer's business.

Commission counsel also asked that Commodore be required to adopt an express policy with respect to sexual harassment, and even argued that an order be made that Commoodre accede to any reasonable request by the union to open the existing colective agreement to include a provision with respect to sexual harassment. Commodore is, of course, obliged to comply with the law, as are all employers, but I do

not think a Board of Inquiry can or should intrude into the collective bargaining process. Human rights hearings are for the purpose of protecting and enhancing fundamental rights and freedoms in society. Every collective agreement between management and a union must conform to law. But for a tribunal to impose a specific contractual provision upon an employer, or a union, would be to interfere with their respective freedom to negotiate a contract on their own terms within the law.

If the evidence in this case had disclosed sexual harassment by more than one employee of Commodore, it might have been appropriate to have an on-going management-employees committee constituted, with participation by the Ontario Human Rights Commission, to deal with such a general problem so as to establish a workplace free of sexual harassment. Although there were some references to possible harassment by one other foreman and vague references to one or two other male workers, the subject of this hearing, as the evidence developed, was really just the sexual harassment of Mr. DeFilippis. If the sexual harassment had been more pervasive, involving other harassers, an order similar to the one made in Dhillon v. F. W. Woolworth Company Ltd., (1982), 3 C.H.R.R. D/743 at D/763 (see para. 6728, and the Order, in particular, at D/763, D/764), to deal with racial name-calling and racial harassment in a factory, might have been appropriate. That type of remedy may well be appropriate for consideration in another sexual harassment case in the future.

## ORDER

This Board of Inquiry having found the Respondents to be in breach of paragraphs 4(1)(b) and (g) of the Ontario Human Rights Code, R.S.O. 1980, c. 340, in respect of the Complainants Edilma Olarte, Maria Magnolia Estrada, Yolanda Munoz, Elvira Benel and Eneyda Mejia, in breach of paragraph 4(1)(g) of the said Code in respect of the Complainant Edilma Biljak, and in breach of paragraphs 6(a) and (e) of the said Code in respect of the Complainant Elvira Benel, for the reasons given, this Board of Inquiry orders the following:

1. The Respondents are jointly and severally liable to pay forthwith to the Complainants, as follows:

   (a) to the Complainant, Edilma Olarte,

      (i) as damages for lost wages, the sum of one hundred and sixty ($160.00) dollars;

      (ii) as general damages, the sum of fifteen hundred ($1,500.00) dollars; and

      (iii) as interest, the sum of six hundred and sixty-four ($664.00) dollars.

   (b) to the Complainant, Edilma Biljak,

      (i) as general damages, the sum of two thousand ($2,000.00) dollars; and

      (ii) as interest, the sum of eight hundred ($800.00) dollars.

   (c) to the Complainant, Maria Magnolia Estrada,

      (i) as general damages, the sum of two thousand ($2,000.00) dollars; and

(ii) as interest, the sum of eight hundred ($800.00) dollars.

(d) to the Complainant, Yolanda Munoz,

(i) as damages for lost wages, the sum of six hundred and forty ($640.00) dollars;

(ii) as general damages, the sum of two thousand ($2,000.00) dollars; and

(iii) as interest, the sum of one thousand and fifty-six ($1,056.00) dollars.

(e) to the Complainant, Elvira Benel,

(i) as damages for lost wages, the sum of six hundred and forty ($640.00) dollars;

(ii) as general damages, the sum of two thousand ($2,000.00) dollars; and

(iii) as interest, the sum of one thousand and fifty-six ($1,056.00) dollars.

(f) to the Complainant, Eneyda Mejia,

(i) as damages for lost wages, the sum of six hundred and forty ($640.00) dollars;

(ii) as general damages, the sum of four thousand ($4,000.00) dollars; and

(iii) as interest, the sum of one thousand eight hundred and fifty-six ($1,856.00) dollars.

2. The Respondent, Rafael DeFilippis, shall cease and desist forthwith in the sexual harassment of female employees of the corporate Respondent.

3. The Respondent, Commodore Business Machines Ltd,. shall do whatever is necessary to ensure that the Respondent, Rafael DeFilippis, ceases and desists forthwith in the sexual harassment of its female employees.

Dated at Toronto this 11th day of October, 1983.

Peter A. Cumming
Board of Inquiry